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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Swint v. Pullman-Standard
U.S. District Court,
Northern District of Alabama

SWINT, *et al.* v. PULLMAN—STANDARD, Bessemer, Alabama, UNITED STEELWORKERS OF AMERICA LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and IAM, LOCAL LODGE 372, No. 71-955-S, September 13, 1974

Civil Rights Acts of 1866 and 1964

—Seniority—Departmental seniority system ► 108.3315

Departmental seniority system is not per se violative of Title VII or 42 U.S.C. § 1981, but is unlawful only if applied in discriminatory manner or if it locks in effect of present or past discrimination in departmental or job assignments.

—Seniority—Departmental seniority system ► 108.3315 ► 108.3370

Employer that maintains departmental seniority system is not violating 42 U.S.C. § 1981 or Title VII, since this system is not perpetuating effects of prior discrimination against black employees. (1) Under agreement with U.S. Department of Labor, black employees affected by prior discrimination are given transfer rights with carryover of plant seniority, and what little racial identification of job classifications still can be discerned either by doctrine of waiver or that of estoppel from thereafter suing under 42 U.S.C. § 1981 for relief not provided by award.

Civil Rights Acts of 1866 and 1964

—Racial discrimination—Retaliation—Discharge ► 108.3025

Employer did not violate 42 U.S.C. § 1981 or Title VII when it discharged, for insubordination, two black employees both of whom had filed charges with EEOC and one of whom also had been active on plant civil rights committee. (1) Employer had ample reason for believing employees guilty of insubordination, as well as of other prior derelictions in employment; (2) there is no evidence from which it might be inferred that they were discharged because they were black; (3) it does not appear that persons who made decision to discharge employees were even aware of filing of charges; (4) no other employee who had filed charge or served on civil rights committee was retaliated against.

—Attorneys' fees—Costs—Recovery by employer and union ► 108.8915 ► 108.8950

Employer and union that prevailed in employees' action under 42 U.S.C. § 1981 and Title VII are not entitled to award of attorneys' fees and costs, since (1) it is quite possible that action has played some therapeutic role in bringing about employer's agreement with U.S. Department of Labor to enter into corrective action program and strides made by employer in fashioning its affirmative action plans; (2) exposure of employer's employment practices has not been without some benefit to both employer and union; (3) counsel for employees displayed unusual ability, fairness, and industry.

Action under 42 U.S.C. § 1981 and Title VII of Civil Rights Act of 1964 by black employees against employer and unions. Employer's agreement with U.S. Department of Labor modified and applied to unions, and judgment otherwise for employer and unions.

U.W. Clemon (Adams, Baker & Clemon), Birmingham, Ala., and Jack Greenberg and Marilyn Holifield, New York, N.Y. for plaintiffs.

C.V. Stelzenmuller (Thomas, Taliaferro, Forman, Burr & Murray), Birmingham, Ala., for defendant employer.

John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for Steelworker defendants.

Full Text of Opinion

SAM C. POINTER, Jr., District Judge:—This case involves individual and class claims of racial discrimination in certain employment practices of Pullman at its Bessemer, Alabama, Plant. In part, the claims are also made against the United Steelworkers of America, AFL-CIO, and it Local 1466. Individual notice to class members was not required by the court;[1] but company bulletin boards were used to advise employees of the pendency and nature of the litigation and to explain how they could make known to the parties evidence thought to have some bearing on the case. While pretrial conferences succeeded, with the agreement of counsel, in limiting the issues to five in number,[2] some sixteen days of trial were consumed in the presentation of evidence, in large part due to the leeway permitted in such cases for introduction of matters having potential circumstantial relevance.

Overview

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[3] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent

[1]All footnotes for this section appear at the end of this Appendix, pp. A-32-A-44.

and dramatic fluctuations in the level of employment.[4] Since the early 1940's, most[5] of the production and maintenance workers at Bessemer have been represented by the United Steelworkers, which also holds representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Bessemer, over a hundred in number,[6] are divided among 25 different departments of varying sizes.[7] Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[8] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, clasifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

[Seniority System]

Under the local rules at Bessemer, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Bessemer, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job classification for each employee, these

designations do not reflect his[9] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18 month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[10] Understandably, plaintiffs do not assert that Pullman's initial hiring policies, as such are now or ever have been racially discriminatory.[11] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the passage of Title VII. Further, the plaintiffs contend—with very little dispute[12]—that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only."

[Program Implemented]

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver job to blacks,[13] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively. Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966 an agreement was made with the union to utilize seniority in the filling of temporary

vacancies.[14] Negotiations were commenced in 1968 with the Department of Labor, which led in January 1969 to a conditional memorandum of understanding designed t o enhance opportunities for blacks.[15] Although this memorandum never became fully effective due to lack of union acceptance, Pullman through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particulary significant in the training of black welders.[16]

In May 1972 Pullman entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment practices into compliance with Executive Order 11246 as amended.[17] Of the many provisions in the twenty-five page agreement, the most significant to the issues in this case are those relating to inter-departmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low-ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[18] These transfer rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age.[19] For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior

job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

[Class Issues]

For determination in this cause are four claims of class discrimination[20] and a claim of individual discrimination by two employees. The class issues are as follows:

> (1) Does the system of departmental seniority, even with the changes made under the agreement with the Department of Labor, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[21]
>
> (2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?
>
> (3) Has there been discrimination in the promotion of persons to supervisory positions?
>
> (4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[22]

I. Departmental Seniority

Notwithstanding the provisions of 42 U.S.C.A. § 2000e-2(h), exculpating "bona fide" seniority systems, it is clear that a

departmental seniority system, "neutral" on its face, may yet be an impermissible instrument for discriminating, or perpetuating the effects of past discrimination, against employees because of race or color. This may result when there is, or has been, discrimination in the assignment of black employees among the departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying jobs. See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA 5 1974)[23]; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 7 FEP Cases 627 (CA 5 1974). Indeed, in other cases presented to it, this court has concluded that eradication of the effects of past discrimination required use of plant-wide seniority with transfer rights. See, e.g., U.S. v. United States Steel Corp., 371 F.Supp. 1045, 7 FEP Cases 322 (1973).

A departmental seniority system, however, is not *per se* violative of Title VII or § 1981. Rather, such a system is pernicious only if it is applied in a discriminatory manner[24] or if, as is more commonly the situation, it locks in the effects of present or past discrimination in departmental or job assignments.[25] For example, in the Johnson case, where seven of Goodyear's departments had been white-only and the other (Labor) had been black-only,[26] the use of departmental age tended to frustrate the therapeutic effects of a 1968 rule permitting interdepartmental transfers. Likewise, in the Franks case, black employees had been confined solely to a single division of a single department in jobs that "require the most menial work and bring the lowest pay."

[Critical Inquiry]

A critical inquiry is to what extent—and with what effect—has there been discrimination in the assignment of employees to the various departments. The following chart, prepared by the court, reflects by department, ranked by job

class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.[27]

Five of the ddepartments—all but one being in the upper hall of the ranking—were all-white; and three—all on the bottom—were all-black. Pullman does not really deny that to perpetuate the effects of such assignments would be violative of Title VII. However, under its agreement with the Department of Labor, the black employees affected by such prior discrimination are given transfer rights with carry-forward of total plant seniority. It is not without significance that, of the assignments to the formerly all-white departments since the agreement, the only assignments to the Template, Powerhouse and Plant Protection departments have been of black employees and over half of the assignments to the Airbrake and Inspection departments have been of black employees.

Department/JC	#B	#W	%B	%W	%B	%W	%B	%W
			I.		II.		III.	
1. Template 2-20	0	9	0	0.77	—	—	—	—
2. Maint. 4-18	26	98	2.26	9.12	2.54	8.98	—	—
3. Forge 1-17	12	20	3.30	10.06	3.71	10.81	1.43	6.35
4. Power. 6-16	0	4	3.30	11.17	—	—	—	—
5. Inspec. 12-13	0	28	3.30	13.55	—	—	—	—
6. Punch & S 1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
7. Mob. Cr. 5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
8. Press 1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
9. Rail. 7-11	8	10	18.85	18.41	21.17	16.03	22.79	24.44
10. Air Brake 6-11	0	27	18.85	20.72	—	—	—	—
11. S. Const. 1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
12. Paint ST 1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
13. S. Erec. 1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
14. W. Erec. 1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
15. W. Mill 1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
16. Welding 1-10	161	678	82.97	95.14	93.17	96.05	—	—
17. Wheel & A 1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
18. S. Misc. 2-9	86	2	91.57	97.01	—	—	—	—
19. S. Stores 2-9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
20. P. Protec. 6-8	0	12	95.48	98.89	—	—	—	—
21. L. Stores 3-8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
22. M. Stores 3-8	7	6	96.52	100	100	100	100	
23. Truck 1-6	21	0	98.35	100	—	—	—	—
24. D & T 1-5	9	0	99.13	100	—	—	—	—
25. Janitor 1	10	0	100	100	—	—	—	—
	1151	1173						

[Column II]

Attention therefore should in this case be directed to the percentage column II, which portrays the distribution by race excluding those departments covered by the agreement; i.e., the eight one-race departments and the Steel Miscellaneous department. This reveals that, while only in five of the sixteen departments (Mobile Crane, Railroad, Paint and Shipping Track, Lumber Stores, and Miscellaneous Stores) was the racial composition of the department approximately equal to the ratio for the total of all such departments,[28] yet there was no pattern of favoritism to whites in the departmental assignments. Indeed, on balance, blacks as a group appeared to receive somewhat of an edge in such assignments.

Special consideration must be given to the significance of the data respecting composition of the Maintenance and Welding departments. A high proportion of the jobs in these two departments require special skills; and yet, as previously noted, the positions are not arranged in lines of progression through which one, by assignment to entry level positions, can acquire the necessary training and experience to qualify. Accordingly, those positions typically have been filled by "off-the-street" employment of persons already possessing requisite qualifications. Bare statistics showing only the racial composition of the employees in those departments do not—absent a study of the qualifications of the applicants or at least a showing of examples in which qualified blacks were not assigned to such departments—evidence discriminatory assignments thereto. There has been no such study of applicants, nor indeed has there been any showing that the company declined to assign a qualified black employee or applicant to either black employee or applicant to either of the departments. Accordingly, a more realistic picture of departmental distribution of employees by race insofar as pertinent to the issues in this case is given in percentage column III of the chart. With perhaps one excep-

tion—the Forge department—the conclusion must be drawn that black employees were not adversely affected by such disproportionate departmental assignments as existed at the Bessemer plant.

[Forge Department]

Even with the Forge department an uncritical acceptance of the data can be deceiving. For although in June 1965 there were 12 blacks and 20 whites on its departmental seniority roster, other evidence shows that there has not been discrimination against blacks in the assignment of personnel to this "good" department. Indeed, just three years earlier, blacks constituted 47% of the Forge department while representing less than 42% of the total plant work force. (See Px-21).

Of course changes in the racial composition of the departments occur over time due to new hires and assignments and terminations. A study of the company's assignments from 1965 to 1974 discloses an obvious effect by Pullman to "correct" the racial imbalances in the departments. Those departments which in 1965 had been predominantly of one race are, without exception, closer in 1973 to the racial ration for the plant as a whole; and those departments which had been exclusively of one race are, with one exception, no longer "segregated". While the Janitors department is reflect as all-black in 1973, it should be noted that during the 1965-73 period two whites had been assigned to it, but subsequently quit.[29] A chart prepared by the court (not reproduced in this opinion) similar to that for June 1965 reflects that in June 1973 38.24% of the black employees in the sixteen departments not covered by the agreement (and 26.-44% of the whites) were assigned to departments in the upper-half of departmental ranking; and approximately 5% of each racial group was assigned to the four "bottom" such departments.

A study based on seniority rosters suffers in that it does not, of course, show actual work forces at any particular period. The only source in the evidence for making such a study is a compilation (page 74 of DX-351) which reflects for all but the smallest departments the monthly averages for the period December 1972 to June 1974 of the actual number of persons, with racial percentages, who drew checks during the month. In the court's study of such data, put into a form similar to that shown in percentage column III of the June 1965 seniority study for those departments for which the information was available, it was found that 40% of the blacks drawing paychecks were in departments in the upper-half of the department rankings, as compared to 36% of the whites.

[Contention]

In support of their attack upon Pullman's departmental seniority system,[9] the plaintiffs have by a series of exhibits, PX-41 thru PX-50, asserted that 92% of the jobs were segregated, i.e., "white only" or "black only", in 1962, and that 49% of the jobs were segregated even in 1973. A major difficulty with this approach is that it accords the same statistical significance to a job classification held by a few employees as to one held by scores or hundreds. If the number of employees in particular classifications is taken into account, it appears that less then 7% of the 2,900-plus employees on the 1973 seniority roster held "white only" or "black only" classifications. Moreover, to be meaningful, the calculations should be adjusted so as not to treat as "segregated" those classifications (1) which are one-man jobs (and hence necessarily of only one race); (2) which in prior years have been held by employees of both races (by looking at the seniority lists from 1966 through 1973); or (3) which are held by both races in other departments (e.g., the hook-on classification in four departments was held in 1973 only by blacks, but the same job in two other departments

was held by both blacks and whites). If this adjustment is made, it appears that less than 3% of the employees held "segregated" classifications according to the 1973 seniority roster.

As to the putative effect of such segregation, only 9 blacks have "segregated" classifications below JC 8; and only 14 whites have "segregated" classifications above JC 13. Twelve of these whites have the classification of Electrician Motor Inspector (JC 16) while in the same department (Maintenance) there is a black employee with the classification of Electrician Wireman-Craft (JC 18), and the other 2 whites hold the classification of Powerhouse Operator, in which there have been no vacancies in over 20 years. If one disregards those "white-only" classifications where a black employee in the same department has held another classification of equal or greater JC level, it appears that only 14 whites in 1973 held "segregated, higher" classifications: 2 at the JC 7 level, 7 at the JC 8 level, 3 at the JC 10 level, and 2 at the JC 16 level. In the two higher classifications (JC 10 and 16), there have been no vacancies since 1965.

[Job Classifications]

The difficulty with using seniority rosters, rather than actual work assignments, is even more pronounced in a study of job classifications than in one of the departental assignments. As previously indicated, the seniority rosters reflect the job classifications as to which the employee has demonstrated satisfactory performance so as not thereafter to be questioned as to "relative" ability, and frequently only the highest rated job as to which he has so demonstrated his ability is shown on the roster. Typically, an employee is considered as qualified—and during periods of force reductions will work—jobs in the department lower than that shown for him on the roster. Accordingly, for example, to treat only black employees as holding the classification in the maintenance department as

Oiler or Helper is somewhat misleading, since there are whites having higher rated classifications in the department who are considered as possessing such qualifications. Employees will also on occasion work jobs higher than the classification shown for them on the seniority rosters. Finally, the number of persons holding a given classification on the seniority rosters is not necessarily a reliable means for determining the actual number of persons who will be working that job even at times of high production; and, indeed, if one looks at the number of white employees who at high employment will actually be working a "segregated" job (as to which some vacancy has existed since 1965) which has a higher job class than those at which blacks are working in that department, only 3 whites will be so "favored", and they are at the JC 7 and JC 8 levels.

The foregoing analysis should not be understood as denying the existence of segregation of jobs in the past. Indeed, until mid-1965, such practices significantly discriminated against black employees; and the effects thereof lingered, with diminishing extent, over the following years. Rather, what it does indicate is that the changes which were then made — the opening up of jobs to blacks through permitting them actually to use their departmental seniority to obtain better jobs—are remedying[1] (rather than perpetuating) the effects of such past job discrimination. What little racial identification of job classifications can still be discerned is basically due to the time lag which is an inherent quality of "rightful place" remedies.

Supportive of the conclusion that the seniority system at Bessemer is not perpetuating the effects of prior discrimination are the earnings figures submitted into evidence. The average earnings for black employees in comparison to those of white employees has risen steadily, such that by 1973 the average total earnings for black employees was $7,031, or 96.-8% of the average total earnings for whites, $7,259. If one could eliminate from such calculations those whites holding high-paying jobs

due to craft status or pre-1965 incumbency, it is clear that earnings of blacks would be on a parity with, or somewhat above, those of comparable white employees. Moreover, though not capable of measurement, there are potential opportunities for further increases in relative earnings for blacks due to the transfer rights under the agreement from some of the lower paying departments and to some of the higher paying departments.

[Two Narrow Attacks]

Deserving of special consideration are two rather narrow attacks made by the plaintiffs upon the departmental seniority system as altered by the agreement with the Department of Labor; namely, that the transfer rights under the agreement are inadequate for failing to provide "red-circling" and for limiting the privilege to persons employed before April 30, 1965. These contentions are not dependent upon establishing discrimination in assignments other than in the nine departments covered by the agreement, and, as implied earlier in the decision, the court does conclude that there was such discrimination regarding those departments (though not as regards the other sixteen departments).

"Red-circling" is, of course, a standard remedy in cases of past discrimination, frequently necessary "since otherwise employees could not afford to take *training* jobs paying lower wages;" Pettway v. Acipco 494 F.2d 211, 248 n. 99, 7 FEP Cases 1115, 1144 (CA5 1974); and this court has mandated its use in other Title VII cases. Where the job from which the employee transfers pays more than the new job and the new job is in a department where the top wage rate is greater than rates in the old department, the employee is "red-circled", i.e., paid at his old wage rate until he advances to a job paying more or voluntarily freezes at the new job.

The court concludes that under the particular circumstances of this case, however, red-circling is not appropriate respecting the nine transfer departments. Virtually all of the jobs in the transfer-out departments have lower JC levels than the lowest JC jobs in the transfer-in departments. More significantly perhaps, there are no lines of promotion or residency requirements to impede promotions in the new department; and the frequent fluctuations in employment levels at Bessemer create many opportunities for advancement in the new department, as well as obfuscate the meaning of an employee's "old wage rate". Nor, except in a very loose sense, are there "training" jobs in the new departments. Finally, it should be noted that, in the evidence presented to the court concerning turndowns or disinterest in transfers under the agreement, the key feature seemed to be confusion or apprehension concerning seniority carry-over and retreat rights,[12] and not the risk of possible diminished wage rates.

While tacitly admitting—as indeed they must—that in the last several years Pullman has abandoned any discrimination in making assignments to the nine departments covered by the agreement, the plaintiffs contend that this change was not made immediately on April 30, 1965. Plaintiffs assert that discrimination in assignments to such departments continued for a number of years thereafter; and that, accordingly, transfer rights accorded under the agreement should be extended to black employees hired prior to, for example, June 1, 1969. In the court's opinion the situation regarding each department should be given separate consideration.

[Assignment Practices]

The court has studied the yearly seniority rosters to ascertain the assignment practices of the company in the years following April 30, 1965, looking to those who "survived" in the department long enough to be listed on the seniority roster published

after their assignment. As to the formerly all-white departments: blacks did not make the Air Brake seniority list until the 1971-72 period, although 6 whites previously had been added to the list subsequent to June 1, 1965; no black made the Inspection department list until the 1970-71 period, although 7 whites previously had been added after June 1, 1965; a black employee made the Plant Protection list in 1967-68, but a white employee had been added in the prior year; in the Template and Powerhouse departments the first (and only) person added after June 1, 1965, has been a black employee. As to the formerly all-black departments: the first whites were added to the Truck department in 1968-69, and one black previously had been added after June 1, 1965; the first whites were added to Die & Tool in 1971-72, but 2 blacks previously had been assigned subsequent to June 1, 1965; the first white was assigned to the Janitors department in 1967-68, but two black employees previously had been added after June 1, 1965. Respecting the Steel Miscellaneous department, four of the first thirteen employees added were white.

The court concludes, largely on the basis of the foregoing statistics, that the company did not abandon racially discriminatory assignment practices regarding the Janitors and Plant Protection departments until June 1, 1967, regarding the Truck department until June 1, 1968, regarding the Inspection department until June 1, 1970, and regarding the Die and Tool and Air Brake departments until June 1, 1971. The court concludes that discriminatory assignments were not made after April 30, 1965, respecting the Template, Powerhouse and Steel Miscellaneous departments.

[Remedy]

Based upon the foregoing conclusions, the defendants are directed (1) to expand" the definition of the "affected class" as

contained in paragraph one of the agreement (the "transfer-out" group) to those black employees assigned to the Janitors department who were employed prior to June 1, 1967, assigned to the Truck department who were employed prior to June 1, 1968, or assigned to the Die & Tool department who were employeed prior to June 1, 1971; and (2) for purposes of "transfer-in" to the Plant Protection, Inspection and Air Brake departments under paragraph two of the agreement, to add[14] to the list of eligible black employees those who were employed prior to June 1, 1967, June 1, 1970, and June 1, 1971, respectively.

Other than to the limited extent indicated in the preceding paragraph, the plaintiffs' attacks upon the departmental seniority system (as altered by the agreement with the Department of Labor) are denied. With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments. As to those nine departments infected by past discrimination in assignments, the effects thereof are not being perpetuated by the present system with its transfer rights (as partially modified by the court in the preceding paragraph). It is not without significance that the Steelworkers local, which was organized principally by blacks, and whose policies over the years have been shaped as much by blacks as by whites, has advocated departmental seniority and, indeed, within the past several years, has rejected by unanimous vote a company proposal to merge several of the departments. Finding no statutory violations, it is unnecessary for the court to deal with the company's rear-line defense of business necessity.

II. Work Within Same Job Class

With one exception to be discussed infra, management has the sole authority under the collective bargaining agreement to assign work among employees working in a given job class in a department.[15] For example, a rivet driver has no voice in the

decision whether he is to drive rivets on the roof, or on a "top corner," or along the side, etc. While his pay in any event is the same,[16] the individual riveter frequently as personal likes and dislikes about particular assignments. Likewise, the company can transfer, without regard to seniority, an employee from one JC 6 job to another JC 6 job in the same department, such "lateral" transfer being within the management prerogative provisions of the labor contract. Here again, a particular lateral assignment may be distasteful to the individual employee.

The plaintiffs claim that, in exercising this discretion, Pullman gives the more dsirable assignments to white employees and the less desirable ones to blacks. Certainly such a practice, if established, would be violative of the anti-discrimination statutes notwithstanding the provisions of the collective bargaining agreement."

[Evidence]

Neither the claim, nor its denial, is susceptible of proof by direct statistical means; and, in essence, the plaintiffs rely upon purported examples of such discriminatory assignments, coupled with evidence of other acts and practices indicative of bias against black workers by a predominantly white group of foremen.[18] In support of its denial, aside from noting that the burden of proof is upon the plaintiffs, the company has offered evidence to show that the differences in jobs are merely matters of individual preference, that best utilization of skills is the criterion for such decisions (and not racial considerations), and that, under the business necessity doctrine, employees cannot be given the right to choose their own particular work assignments.

It is clear from the evidence that many—perhaps most—employees believe that some work assignments are better or worse than others. It is clear that many black employees who have received, in their opinion, a "bad" assignment from a

white foreman, consider the situation one of racial prejudice. The court must, of course, examine for itself the reality of the labels so placed by the witnesses."

Yet the evidence is also clear that there is no general agreement among the employees as to which are the better, or the worse, work assignments for their job classification. Some riveters considered roof work exceptionally dirty; another liked it because he could kneel and work in a downward position; some preferred positions where there was no "O.K." (Corrective) work, and others considered "top corner" work good although it involved "O.K." work. Some spray painters liked the elevator-like platforms to work from; others preferred the old scaffolding method; some thought stencilling better work, but a stenciller, musing about the fumes when cleaning stencils, though otherwise. Evidence about other work assignments has the same theme: in short, "the grass looks greener. . . ." The court cannot conclude from the evidence that in fact some particular work assignments are objectively better or worse than others, either from the characterizations given by the employees or from a consideration of the particular functions to be performed.

[Typical Situation]

Indeed, the typical situation of assertedly racial discrimination as presented to the court involved the assignment of work as between two or more black employees. In a few instances, the complaint did relate to a white employee receiving a "better" assignment, or a black receiving a "worse" one; but the evidence also showed that on other occasions this "better" assignment was given to blacks and this "worse" one to whites. Significantly, the assignments being criticized by the witnesses had been made by white, black, and Spanish-surnamed foremen.

Testifying were a number of foremen, both white and black, including some who have since returned to the bargaining unit. Without exception, they attested to the fact that their assignment decisions had been based on their assessment of the relative skills and limitations of their crew, mindful of their responsibility to complete the assigned work properly and on schedule. For example, some welders cannot satisfactorily do certain types of welding at all. Racial considerations, according to the foremen, have not been involved so far as they are concerned or have observed. Foremen do tend to keep an employee on a particular job so long as he is doing satisfactory work and is not needed more on another position—this for the reason that the crew is more efficient when the men are accustomed to the particular details of their assignment—and they may listen to an employee's preference and, on occasion, honor that preference. Nevertheless, the foremen, both black and white, insist that assignments must be left to them rather than to a selection process by the individual workers, at least if that would be a frequent matter.[40]

[Evidence Unconvincing]

The evidence taken as a whole is unconvincing that blacks are being discriminated against in the assignment of work.[41] The dissatisfaction with work assignments at Pullman is basically an employer-employee dispute, not a black-white problem. In part, this conclusion finds support in the fact that in the last collective bargaining negotiations the union had a proposal, similar to the relief being sought by plaintiffs under this issue of the case, for permitting employees to use seniority rights in the selection of work assignments throughout the plant. While such a proposal might be beneficial to black employees (as well as to whites), there is no violation of the anti-discrimination statutes from the failure of a company to accord to blacks all that they want or all that might be beneficial to them. The court's function is not that of master mediator for the benefit of black employees or

for white employees. One might as well come to the court for a mandate to raise wage levels at the plant, an action that no doubt would meet with favor from all black and white workers.

Indeed, it is not merely the plaintiffs and the union, but on a related issue the company as well, that would have this court fight their collective bargaining battles under the guise of remedying discrimination. The company's invitation relates to the one situation in the plant where employee selection of work assignments is permitted—the "sub-assembly" work in the Welding department. As a result of an arbitration proceeding some ten years ago, Pullman was forced to institute a system whereby welders can use their seniority to "sign-up" for certain sub-assembly work at the start of large orders. Opportunities for incentive bonuses are generally better for these jobs than for other welding work, in large part due to the smaller crews on sub-assembly work. Since the welders with the greatest departmental age are predominantly white, the company asks that the court abolish this sign-up procedure.[42]

However, since the court has found no racial discrimination in the assignment of personnel to the Welding department, there is no basis for invalidating[43] the departmental seniority arrangement for sub-assembly work, a facially neutral system which is "bona fide" and is not the result of an intention to discriminate because of race or color.[44] 42 U.S.C.A. § 2000(e)-2(h). That such a system may benefit one race more than another is, absent proof of other discrimination being perpetuated thereby, insufficient—one might as well contend that where white employees on the average have more company, plant, departmental, LOP and job age, no seniority system could be used, or that blacks would have to be given pre-employment credit. Cf. Franks v. Bowman Transportation Co., 495 F.2d 398, 8 FEP Cases 66 (CA5 1974). Here again, finding no statutory violation, the court must reject the company's invitation to adopt its unsuccessful collective bargaining position.

All attacks upon the practices regarding assignment of work within the same job class positions, whether made by plaintiffs, company, or union, are denied; and the parties are left instead to the collective bargaining forum.

III. Promotions to Foreman

Prior to June 1965 there were no black foremen. At the time of trial only approximately 10% of the salaried foremen were black. Only one black has become a "B" foreman. Several blacks have asked for foreman positions, yet not been selected. Selection of foremen is made by an all-white group of supervisors, without any objective standards or tests. This, in essence, is the basis[45] for plaintiffs' claim of discrimination respecting promotions[46] to supervisory positions; and it has obvious appeal.

The front line in the supervisory ranks is the hourly foreman, typically an employee promoted from the bargaining unit in the department to supervise a crew of his former co-workers. Supervising the work done under several houly foremen will by an "A" foreman, who is salaried. The next step is the "B" foreman, and above that comes the Department Head. Hourly foremen are frequently moved back and forth between their supervisory positions and work in the bargaining unit, there being concomitant changes in the needs for supervision as the level of employment in the department rises and falls.[47] The company attempts to limit the number of salaried positions to that which can be given reasonable job security, and selects a foreman from the ranks of successful hourly foremen.

[Key To Issue]

The key to this issue lies in the analysis of Pullman's practices regarding promotion of hourly foreman, for that is the source for higher promotions. Since mid-1965, some 56 blacks—ap-

proximately one-third of the total number—have been appointed as hourly foremen; and the percentage would be higher if the first few years of the period were disregarded. While this is lower than the percentage of blacks in the total workforce, several factors must be taken into consideration. First, it appears that a greater proportion of black than white employees, particularly among those with more experience with the company, fall into the functionally illiterate or minimally literate classifications, and accordingly are less likely candidates for supervisory positions.[48] Secondly, a greater proportion of blacks than whites have turned down opportunities to become hourly foremen.[49] Additionally, due to pre-1965 segregation of jobs, it has taken some time for blacks to learn the range of job skills necessary in many cases to performance of supervisory duties. The statistical evidence, fairly considered, does not support any claim of discrimination since 1965 in making appointments of hourly foremen; and the few instances of individual passovers are likewise unpersuasive.[50]

Inasmuch as blacks constitute a minority—for the reasons indicated above—of group of persons who have served as hourly foremen, it is to be expected likewise that there would be a minority of blacks raised to salaried foremen's positions. Data reflects that approximately 20% of such promotions since mid-1965 have been of blacks, a percentage that is not really disproportionate to the composition of the source group when one takes into account the pre-1965 hourly foremen (all white) and the necessity of some lag time for demonstration of satisfactory performance as an hourly foreman. Thus, while for the 1965-68 period only 4 of the 35 such promotions were of black employees, by the 1971-74 period 8 of 20 were blacks, a ratio higher than the percentage of blacks in the source group. One black hourly foreman testified that when recently complaining that the hadn't been put on salary, he was told that the company was attempting to use a "one-for-one" promotional ratio to salaried positions where possible.[51]

[Subjective Evaluation]

Selection of foremen has been largely a matter of subjective evaluation[32] by an all-white group of supervisors,[33] a fact which provides a ready-made opportunity for discrimination and which in other cases has added weight to inferences of bias drawn from statistical evidence. E.g., Rowe v. General Motors Corp., 457 F. 2d 348, 4 FEP Cases 445 (CA5 1972). But the lack of objective criteria—and in the selection of supervisors it is difficult [34] to arrive at such criteria without at the same time running the risk of potentially unlawful testing or educational requirements—is not itself a statutory violation or, indeed, necessarily even evidence of such a violation. See, e.g., Pettway v. Acipco. 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974) (remanding for a consideration of the effect, if any, of using subjective evaluation). In the case *sub judice,* the court concludes that the statistical evidence, properly evaluated, is not supportive of a claim of discrimination in supervisory appointments in recent years and that there is no evidence of blacks during this period having been passed over in favor of less qualified whites. It must, therefore, follow that the use of subjective judgment in selecting foremen likewise is not shown to be a discriminatory employment practice.

In summary, upon a consideration of the whole of the pertinent evidence—and not merely those parts highlighted by plaintiffs—, the conclusion must be reached that the claim of racial discrimination in promotion of employees to foremen positions has not been proved and is therefore to be denied.

IV. Posting of Assignments

To the outside observer, the exercise of seniority rights for promotion, roll-back, layoff or recall purposes would appear to be fraught with difficulties. There is no bidding procedure, or even posting, of vacancies; nor is there even after-the-fact

notification of changes in assignments. Pullman notes that it has always been this way, for the very good reason that daily changes in employment levels and in assignments makes a bidding procedure impossible and a posting of assignments unnecessarily burdensome. According to Pullman, the recent innovation of publicly posting its daily turn-over sheets (indicating hires, terminations, layoffs, and recalls) really is of little benefit to the employees, inasmuch as these sheets in the past have been given to, and monitored by, union officials. Counsel for plaintiffs contend that black employees are entitled to some better system of notification in order that they may take full advantage of their seniority rights.

The court, frankly, was astonished during pretrial conferences that such a system—or lack of a system—could work. During trial, however, it became apparent from the evidence that the company's contentions as to the impossibility of a bidding procedure and as to the lack of utility of public posting of daily assignments were not specious. More importantly it was clear from the testimony that the employees, white and black, found the "word-of-mouth" and "personal observation" approach satisfactory and workable. Critical to this case, it was clear from the evidence that the lack of formal procedures for notification neither discriminated, nor perpetuated the effects of any past discrimination, against blacks. It should be noted in this regard that at Pullman's Bessemer plant the union officials play a far more active role in monitoring and ferreting out violations of employees' seniority rights than this court has found at other plants, and that these union positions are shared rather evenly between blacks and whites.

The court has no doubt but that some better system of giving notification about assignments could be adopted for this plant—though it would have to be different from that found in typical collective bargaining agreements—and that such a system, though the present one meets with general satisfaction,

would be of benefit to the employees, both white and black. However, as indicated earlier in this opinion, the court's role is limited to providing remedies for violations of the anti-discrimination statutes, and otherwise not to interfering with the collective bargaining process. As an issue in this lawsuit, plaintiffs' claim regarding posting of notices and the like is due to be denied, leaving the matter for collective bargaining processes.

V. Discharges of Swint and Humphrey

Louis Swint and Clyde Humphrey, black employees in the Steel Erection department, were fired by Pullman in May 1971 and November 1972, respectively. Disappointed with the outcome of arbitration proceedings,[55] each attacks the company's action as discriminatory or retaliatory, each having filed a charge of racial discrimination with the EEOC[56] prior to discharge and Swint also having been active on the plant's Civil Rights Committee.

In each instance the principal reason assigned by the company for its action was that of insubordination; and, without recounting the extensive evidence here, it is clear that the company had good and ample reason for believing[57] them guilty of such conduct, as well as of other prior derelictions in employment. There can be no doubt but that such action by employees was deemed by the company as a dischargeable offense, whether coming from blacks or from whites; and the only real question is whether these were but labels—were but a subterfuge—to cover the real reasons for their discharges; namely, that they were black or that they had caused problems to the company through filing of EEOC charges or Swint's service on the Civil Rights Committee.[58]

There is not the slightest evidence anywhere in the record on which the court might indulge in the inference that they were

fired because they were black. Perhaps the most telling point is that Swint's insubordination was directed toward a black foreman and that, in Humphrey's case, another black employee, who had been jointly involved in a refusal to do assigned work, was given no punishment when he recanted and agreed to do the work. (Humphrey persisted in refusing to do the work, was therupon discharged, and was reinstated by the arbitrator on the basis there was not enough distinction between the conduct of the two to justify the widely disparate treatment by the company.)

[No Retaliation]

Nor is there substance in the assertion that Pullman's actions were retaliatory for earlier EEOC charges. It does not appear that the persons making the decision to discharge them were even aware of the filing of the charges. These were not the only charges filed with the EEOC—there have been a number of them, virtually all, it may be noted, having been found to be without probable cause. The evidence discloses that a number of those who have made claims of racial discrimination have obtained, if anything, favored treatment thereafter from the company in the form of obtaining promotions, transfers, reassignments, etc., which they had requested. Examples include Henry Vann, Spurgeon Seals, Edgar Davis, Junior Wormley, Willie James Johnson (one of the two named plaintiffs in this case), and William C. Harris. With the sole exception of the claims of Swint and Humphrey, the evidence reveals no instance of an employee filing an EEOC charge or serving on the Civil Rights Committee and thereafter being subjected to any allegedly retaliatory action from the company. In the present case it is unlikely that either Swint or Humphrey would have remained with Pullman as long as they did unless the company had been "bending over backwards" on their behalf. Their claims are denied.

Conclusion

With the limited exception of expanding somewhat eligibility to transfer rights under the 1972 agreement respecting six departments, the various claims and items of relief sought by plaintiffs are due to be denied. While the defendants must be considered as the "prevailing parties", nevertheless, in the exercise of discretion, the court believes that attornes' fees and costs should not be awarded to them. It is quite possible that the presence of this litigation has played some therapeutic role in bringing about the 1972 agreement and the strides made at Pullman in fashioning its affirmative action plans for enhancement of opportunities for black employees. The exposure of employment practices at Pullman through this litigation has not been without some benefit to both the company and the union. In a case where counsel for the plaintiff class has displayed unusual ability, fairness, and industry, it would hardly be in the public interest not only for his firm to go without recompense for considerable time and expenses, but for his clients as well to be taxed with additional charges. Judgment will reflect that each party is to bear his or its own costs and expenses.

Judgment

In accordance with the findings and conclusions contained in the Memorandum of Opinion filed concurrently herewith, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Memorandum of Agreement of May 1972 between the Department of Labor and Pullman-Standard is declared to be binding upon the union defendants; but eligibility under the agreement for transfers from the Janitors, Truck, and Die & Tool (CIO) departments and for transfers to the Plant Protection, Inspection, and Air Brake & Pipe Shop departments shall be modified to include certain classes of employees as more fully specified in the Memorandum of Opinion. Liability, if any, for

back pay in favor of persons benefited by such change in eligibility respecting transfers from the Janitors, Truck, and Die & Tool departments is severed for subsequent proceedings, as may be necessary, in accordance with procedures specified in the Memorandum of Opinion; but there is no just reason for delay as to the other issues in the case and entry of final judgment as to all such other issues is expressly directed.

2. In all other respects the claims of plaintiffs and of the plaintiff class are denied and the action dismissed with prejudice.

3. Each party shall bear its own costs.

Appendix A - Footnotes

[1] The court concluded that the case was maintainable as a class action under Rule 23(b)(2) and that neither constitutional requirements nor Rule 23(c)(2) made individual notice mandatory under the circumstances. Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 9 FEP Cases 1302 (1974).

[2] One of the five issues, that involving posting requirements, was thought resolved in advance of trial, but the plaintiffs, believing that resolution inadequate, chose to present the issue at trial as permitted by the pretrial order.

[3] Orders may be for as few as 25 cars, or for several thousand.

[4] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have have been aproximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[5] Millrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman, the I.A.M. and its Local Lodge 372 were joined as defendants at the time of trial although not previously named in any charges before the EEOC or involved in the allegations of the pleadings in this case. Since the I.A.M. jobs are only indirectly involved in this litigation, such positions are not dealt with or included in the review of evidence or the findings in this opinion unless specifically noted.

[6] While the job classification manual lists some 250 jobs, many of these are not worked at Bessemer, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[7] According to data showing the average number of persons drawing paychecks by department over an 18 month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[8] For example, Cleanup man, JC 1, has the lowest non-incentive standard hourly wage ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage (15,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[9] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[10] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965, seniority list. However, by looking at the June 1964 seniority list (PX-2) and by taking account of the additions and deletions to that list representing hires and terminations during the year, it is possible to construct the functional equivalent of, the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month, per page 35 of DX-351). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, i.e., 49.5% exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, i.e., 44% and 46%, respectively.

[11] That the percentage of black workers at Pullman is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 (page 83 of DX 351), showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[12] Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

[13] For a number of years the labor agreement has contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[14] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[15] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[16] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company. This new requirement, though not unreasonable standing by itself, might constitute a discriminatory practice since in prior years whites were able to get testing with only company experience. This potentially discriminatory requirement, however, is not challenged as one of the issues in this case, and really has nothing to do with such issues, e.g., departmental seniority, assignment of work in the same JC level.

[17] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[18] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[19] It was discovered during the trial that one employee so transferring into the Powerhouse department, Robert Johnson, is not credited on the seniority rosters with his plant age for promotional purposes and apparently has never been given his option regarding seniority for layoff and recall purposes. Due, however, to stability of employment in the department and lack of subsequent promotional opportunities in the department, it appears that this mistake has been error without injury.

[20] The class was defined as consisting of all black persons who at any time sebsequent to one year prior to the filing of any charges with the EEOC had been employed by Pullman (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated the class prevailed on one or more of the four issues.

[21] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling"; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of the case it became apparent that plaintiffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees. [*Caveat:* The description of the issues in this part of the opinion should be taken merely as defining the contentions and not, for example, as constituting a finding by the court that no provision is in fact made for transfers to the I.A.M. positions under the agreement Cf. fn. 18, supra.]

[22] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e-2(a)(1), and 2000e-3(a). while Mr. Humphrey's are grounded only upon 42 U.S.C.A. § 1981. The court has assumed *arguendo* without deciding, that Humphrey's claim of retaliation for filing EEOC charges can be posited under §1981 and that Swint's alternative claim of retaliation for his participation on a joint Civil Rights Committee is cognizable.

[23] The Franks case disposes of one contention made by plaintiffs' namely, that the agreement with the Department of Labor was deficient in providing a one-transfer-only. See, 495 F.2d at 417 n. 16, 8 FEP Cases at 69. Actually, the agreement *sub judice* does provide for additional transfer rights under certain conditions.

[24] There is no contention in the present case that the departmental seniority system at Bessemer is applied other than in a uniform manner regardless of race or color. Nor is there evidence that the rather limited number of inter-departmental transfers granted at Pullman have been other than in a fair and non-discriminatory manner.

[25] For example, in Pettway v. ACIPCO, 494 F.2d 211, 7 FEP Cases 1115 (CA5 1974), at the time of trial in 1971 there were some 81% of the black employees (as compared with 54% of the whites) assigned to the seven departments (excluding Personnel and those with under 15 employees) having the lowest average wage, while 37.6% of the whites (as compared with 7% of the blacks) were assigned to the five departments having the highest average wage. More significantly, jobs in those mixed departments had in 1962 been totally segregated (whites holding only the higher paying jobs and blacks only the lower paying ones); and, of the limited integration in jobs which occurred over the

next seven years (over 75% of the job classifications still were segregated in 1969), such was effected through the influx of whites into black jobs, without a "sign of movement of blacks into higher paying jobs". Only 25% of the job classifications were integrated in 1971 when the case was tried.

[36] At Goodyear the departments were totally segregated until 1962. The first assignment of a white employee to the labor department occurred in September 1965. Of the 80 blacks hired in 1965-70, over 40% were assigned to the labor department, while of the 149 whites hired in the same period less than 7% of them were so assigned. It was admitted that labor department jobs were the lowest paying in the plant.

[37] A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide a rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job classworked. For the Welding department the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, i.e., less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments; and the June 1, 1965, figures are derived from PX-2. See footnote 10, supra. Percentage column I is computed for all departments. For the purposes indicated in the test of the opinion, percentage column II disregards employees for the nine departments involved in the agreement with the Department of Labor and percentage. Column III further disregards the maintenance and Welding departments. (In analyzing the evidence the court constructed charts of the same format based upon the June 1973 seniority rosters and upon the December 1973-June 1974 average monthly employment data. While these charts are not reproduced in this opinion, some references are made to the results of such studies.)

[38] It should be noted that, absent a conscious effort to achieve racial balance in departments, the existence of disproportionate racial compositions in departments is to be expected. Even when the extent of variation from the mean is great, other factors—such as quit rates, composition of application group at time of hire, applicant preference for employment in departments where other family members or friends are assigned, etc.—must be considered before concluding that racial motivations were involved in making the assignments.

[29] The matter of personal choice cannot be wholly discounted when evaluating departmental statistics. It is clear from the evidence that the blacks in the Janitors department prefer it to most — and a few of them prefer it to all—departments. The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments with higher JC positions.

[30] Actually, even if there were a demonstration of segregation in job classifications, this would have no causal connection with the departmental seniority system, but would be indicative of some other discriminatory practice. Presumably, these studies were offered by plaintiffs as circumstantial evidence of motive, intent, design, etc., on the issue of departmental seniority and the other issues in this case.

[31] While there is a dramatic improvement in the status of blacks between PX-61 and PX-55, showing job classes of persons by race on seniority rosters for 1964 and 1973, respectively, yet the time lag inherent in "rightful place" adjustments still leaves much room for further movement upward by blacks. For example, the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the rosters above JC 10, as compared with only 12.2% of the blacks. As an illustration of the difficulty of using seniority rosters to evaluate job classifications, it may be noted that for May 8, 1973, the only date for which such information has been presented (DX-274), 10,8% of the whites (and 9.3% of the blacks) actually working on that date in non-craft jobs were in jobs above JC 10.

[32] From January 1969 to May 1972, there was confusion since the 1969 memorandum of understanding, for lack of union acceptance, never became effective. One of plaintiff's witnesses, Alfonso Cole, implied that he was deceived by the Contract Compliance Officers as to his rights under the May 1972 agreements; but the court, having heard all of them, is persuaded that any misunderstanding by Cole is the result of distortion on the receiving, rather than on the sending, end of such communication.

[33] It is possible, though unlikely, that one or more of the blacks not being added to the "affected class" provision would have a claim for back pay based on their not having previously been included in that provision. Questions of back pay were previously severed for subsequent trial as might be necessary. The defendants are directed to give immediate written notice to such persons of their possible entitlement to back pay; and they shall have thirty days from receipt of such

notice (or one year if personal notification cannot be effected) in which to file with the court a claim for such relief. Plaintiffs' counsel may represent such persons unless they choose to employ their own attorneys. Under the provisions of Rule 54(b) the court determines that there is not just reason for delay of the other issues in the case pending resolution of such back pay claims, if any, and expressly directs entry of judgments as to all issues excluding that relating to back pay for such persons.

[14] It is clear that the persons now being added to the "transfer in" groups under the agreeement have no claim for back-pay since the vacancies in the three departments to this point would not have been sufficient to give them, at the bottom of the eligible group, any tranfer rights. Accordingly, any claim for back pay on their behalf is denied.

[15] This assumes, of course, that the work asigned is within the normal range of duties of the position. Occasionally, there will be a claim that certain work has been assigned which is outside the scope of duties and in that event grievances under the contract can be, and have been, pursued. Plaintiffs' contentions in this case are directed to assignments of work which, but for asserted racial implications, would be within management's rights. It may be noted that the provision in the collective bargaining agreement prohibiting discriminatory application of its terms would probably be an overriding limitation on management's rights and be the basis for a grievance under the contract where racial discrimination were involved in the exercise of such powers. Such a possibility does not, of course, preclude an action under Title VII for the same conduct.

[16] Certain assignments in the Punch & Shear department may, due to differing piecerates, have some monetary conequences. Plaintiffs have candidly acknowledged, however, that such results are only of collateral signifcance and not at the core of their complaint.

[17] In view of the court's conclusions as to the claim it is unnecessary to determine an appropriate remedy. Defendant company notes that any compensatory relief would not be "back pay" but rather an award comparable to general compensatory damages for mental suffering, presumably a matter for jury determination. See Curtis v. Loether, ____ U.S. ____ (1974); Lynch v. Pan American World Airways, 475 F.2d 764, 6 FEP Cases 353 (CA5 1973).

" The tendered circumstantial evidence regarding prejudice by foreman is mixed and quite inconclusive. A few black witnesses gave accounts of having been subjected to purportedly abusive language, or the like, from a white foreman; but the paucity of such complaints in comparison to the astronomical number of possibilities over the years, together with the near-paranoiac, exaggerated descriptions by those who did have such complaints, leads the court to place little weight on such evidence. A review of the more than 2,800 grievances filed by white and black employees in the past eight years is hardly supportive of any inference as to discrimination against blacks. The picture is rather that of typical disputes between employees and their employer, with only a very few having even marginal racial overtones. While a greater percentage of blacks than whites have been discharged over the years, a study of the grievances related thereto indicates no unequal treatment by the company. From the testimony of witnesses, the court is convinced that, by and large, white foremen in the past several years when dealing with black workers (and, likewise, black foremen when dealing with white workers) have tended to "lean over backwards" to avoid possible criticism as to discrimination. Over 54% of the temporary promotions to bargaining unit jobs made by foremen in the December 1972 to June 1974 period were to black employees.

" "How many legs does a dog have if you call a tail a 'leg'?" "Only four," goes the epigram, "because what you call it doesn't change what it is." The wisdom so expressed is illustrated by one example—and there are others — from the evidence in the case *sub judice*. Edward Loftin testified that all—or, at the very least, almost all—of the many grievances he had filed against Pullman involved racial discrimination. The grievances—over fifteen of them—were then examined one by one. Not one appeared to have any substantial element of *racial* discrimination. A characteristic grievance was that some other black employee had received an assignment that by seniority Loftin claimed he should have gotten. As to one grievance, Loftin also filed a charge with the EEOC—it involved a 30 day suspension for refusing to obey the orders of his black foreman, and the principal complaint apparently was that he was not adequatley represented by his union since only two union officials were present during one of the grievance steps.

" The company's business necessity defense is persuasive on this claim; that is, if assignments were to be a matter of daily choice. It is not persuasive, however, as to more infrequent opportunities for individual selection, such as to the beginning of a substantial order. While there no doubt would be selections by an employee of work he

could not perform satisfactorily, this could be largely remedied, albeit with increased inconvenience and expense of additional grievances, by use of the "ability" factor in the seniority definition. The failure of the "business necessity" defense does not, of course, mean the establishment of a cause of action.

[41] The court is not so naive as to believe that in no instance has there ever been racial prejudice in an assignment by a foreman. No doubt there has been. But the court concludes that this would have been far from commonplace and uncharacteristic of the conditions of employment at Bessemer. Isolated acts of prejudice, particularly where deemed to exist more by assumptions as to human nature than by direct proof, would not justify the issuance of injunctive relief.

[42] Of course, the company would not want to expose itself to back-pay liability respecting such sign-ups. Its defense—that it was not at fault and, to the extent of its bargaining power, had attempted to eliminate the practice—very possibly would be successful in passing to the union ultimate liability for such back pay. See Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 1974).

[43] The plaintiffs' request that sub-assembly work should be awarded on the basis of plant age (rather than departmental age) must also be denied for lack of prior discrimination in assigning personnel to the Welding department.

[44] Instituted at a time when, due to job segregation, there were only white welders, the sub-assembly sign-up would only have had the effect of determining which whites would get the sub-assembly work andwhich would not. Prior direct discrimination can sometimes be determinative of lack of racial motivation as to other acts. See Taylor v. McKeithen, ____ F.2d ____ (CA5, Aug. 21, 1974; slip op. at pp. 7085-86).

[45] Plaintiffs also assert that black foremen generally are given responsibility only over predominantly black crews. In a sense this is true, for most of the black foremen are located in departments which are predominantly black. This, however, is a natural consequence of a system, such as at Pullman, where most of the foremen come up "through the ranks" of their departments rather than being hired from the outside; and, indeed, a relatively higher proportion of white foremen generally is found in those departments where there is a relatively higher percentage of which employees. The plaintiffs, for obvious reasons do not want a change in the basic in-plant approach to supervisory promotions. Moreover, it is clear that black foremen do exercise supervision over white employees and that at least two normally have supervision over predominantly white crews.

[46] Plaintiffs' attack is upon Pullman's practices regarding promotions of production and maintenance employees to foremen positions not upon its relatively few "outside" hires of managerial personnel. It should be noted that the Plant Manager at Bessemer is one who came up through the ranks.

[47] The employee continues to accumulate seniority in his departmental bargaining unit for two years after promotion to a supervisory position.

[48] This conclusion is reached upon a consideration of census information introduced, of evidence concerning particular employees, and of an analysis of Bessemer employment records conducted by defendant's outside statistician. According to the latter study, 13.3% of Pullman's black employees who had been hired before 1965 were functionally illiterate (as compared to 2.4% of the whites in such category). The court is not holding—nor has the company really contended—that some particular level of education could pass muster as a requirement for promotions to supervisory positions; but it is obvious from other evidence in the case that the lack of minimal education frequently would render such persons unable to perform their required duties and hence make them less likely candidates for such positions.

[49] Testimony revealed many instances of such turn-downs. According to company records, 30 blacks and 17 whites have refused appointments as hourly foremen since the mid-60's, while according to the statistician's study of the 1971-73 period 58.3% of the refusals of such promotions were by blacks. There are many reasons why an employee, white or black, might choose to reject a temporary promotion to foreman; but it is clear from the evidence that an additional problem for blacks considering acceptance of such positions (at least until the past couple of years) was the likelihood of derision as an "Uncle Tom" by some black co-workers.

[50] Basically, these situations involved disgruntlement when other black employees were picked for such promotions ahead of, or instead of, the witness. Alvester Braxton was not selected, according to his foreman, due to excessive absenteeism (shown to the court), lack of initiative in learning other jobs in the department, and an inability to accept responsibility due to a nervous condition. In Braxton's department other blacks have been made hourly foremen, and one a salaried forman. Another, Spurgeon Seals, was turned down because he didn't get along with the other men; and here also in the Paint department,

other blacks have been made foremen before and after the rejection of Seals. Another, a man named Wilson in the Punch & Shear department, was, subsequent to this first request, later made a foreman. The evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications.

[11] If this were the policy—and the company asserts it has no such limitation on promotions of blacks—it would be above that requested as relief by the plaintiffs. In the particular department where this is reported to have been said, five of the last six permanent supervisory promotions have been of black employees.

[12] The selection procedure at Bessemer is not totally subjective. The company is committed under the agreement with the department of Labor to attempting to appoint as temporary foremen no smaller a percentage of blacks than the percentage of black employees in a given department. Moreover, selection of salaried foremen is based upon demonstrated abilities while serving as hourly foremen, and hence is an experientially-based decision, albeit by a presently all-white group.

[13] Actually, one black (a Contract Compliance Officer) at the present time makes significant input to the decision-making process. With blacks starting to move further up the supervisory ladder, in the not distant future the decisions on supervisory positions will likely cease being an all-white function.

[14] The only suggested alternative in the evidence, that by one of plaintiffs' witnesses, was that seniority should be followed in making appointments of foremen. An objective standard to be sure, but hardly an apt one.

[15] Swint's discharge was upheld by the arbitrator; Humphrey's resulted in reinstatement without back pay. Pullman raises two special defenses to Humphrey's claim in this case related to the arbitration proceedings; (1) that his claim here is time barred since, in view of Alexander v. Gardner-Denver Co., 415 U.S. 915, 7 FEP Cases 81 (1974) (allowing pursuit of statutory remedies independent of the grievance machinery), the period during which contractual remedies were being processed should not toll the statute of limitations; and (2) that, having accepted benefits under the arbitrator's award, he should not be allowed "a second bite at the apple". In support of the first point, Pullman cites Guy v. Robbins & Myers Inc., 8 FEP Cases 311 (W.D. Tenn., June 12, 1974; but this court concludes that the Fifth Circuit still approves the tolling concept, as evidenced analogously by its recent decision in Guerra v. Manchester Terminal Corp., 498 F.2d 641, 8 FEP Cases 433 (CA5 No. 73-1907, July 31, 1974). As to the second point, this court concludes there is no basis here for applying a doctrine of waiver of estoppel (since Humphrey is seeking backpay, which was not awarded in the arbitration decision) and that, indeed, Humphrey is not attempting to reap "any windfall or unjust enrichment from the overlapping remedies" under the statutes and the collective bargaining agreement. Cf. Guerra v. Manchester Terminal Corp., supra, slip opinion at p. 6470; footnote 14 in Alexander v. Garner-Denver Co., supra.

[16] In neither case did the EEOC find "probable cause."

[17] The court need not actually decide whether they in fact were guilty of insubordination; it is suficient for the company's defense if management with good reason thought they were so guilty and discharged them for that reason. As a matter of fact, this court—as did the arbitrators—would find they were guilty of insubordination.

[18] There is a suggestion that the real reason for the company's discharge of Swint was its suspicion that Swint had instigated a work-stoppage by others. Even if this were true and would not have been sustainable by evidence in the arbitration proceeding, such would not constitute a Title VII violation. See Balderas v. LaCasita Farms, 500 F.2d 195, 8 FEP Cases 686 (CA5, Aug. 30, 1974).

APPENDIX B

Swint v. Pullman-Standard

Louis Swint et al., Plaintiffs-Appellants,

v.

Pullman-Standard et al.,
Defendants-Appellees,

Clyde Humphrey, Intervenor.

No. 74-3726.

United States Court of Appeals,

Fifth Circuit.

Aug. 30, 1976.

In an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, employees contended that continuation of departmental seniority by the employer perpetuated the effects of past discrimination. The United States District Court for the Northern District of Alabama, at Birmingham, Sam C. Pointer, Jr., J., held that the steps taken by the employer constituted compliance with Title VII, and plaintiff appealed. The Court of Appeals, Clark, Circuit Judge, held, inter alia, that the District Court's result was based on a prima facie case and other burden of proof concepts which did not fit the case at hand.

Affirmed in part, part vacated and remanded.

1. Civil Rights key **45**

While trial court in employment race discrimination action under Civil Rights Act of 1964 was not clearly erroneous in its

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[1]All footnotes for this section appear at the end of this Appendix, pp. A-85-A-99.

use of statistical chart in determining that black employees were not disproportionately assigned to less desirable departments at railroad car manufacturing plant, employees' valid attacks on structure of chart impugned credibility of court's ultimate conclusions based on departmental desirability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights key 43

Plaintiff in employment discrimination action brought under Title VII of Civil Rights Act of 1964 does not have to show economic loss to prove discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights key 44(1)

At least for purposes of injunctive relief, plaintiffs in employment discrimination action were not required to show that they were assigned discriminatorily to less desirable departments in order to prove prima facie case of racial discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights key 44(1)

If back pay is sought in employment discrimination action under Civil Rights Act of 1963 and if defendants have convincingly brought into question the class' entitlement to it, economic harm must be shown and, where discrimination in departmental assignment is alleged, showing of departmental desirability would therefore be relevant to establish such prima facie case. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights key 44(1)

Showing in suit alleging racial discrimination in employment, that departments to which blacks have disproportionately been

assigned are less desirable departments, is probative of racial discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights key 44(1)

In determining whether prima facie case has been proven in class action alleging racial discrimination in employment, question should be whether class has established history of broad patterns of plantwide racially discriminatory departmental assignment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

* * *

29. Civil Rights key 43

Trial court in employemnt discrimination action acted improperly in considering, as indicative of nondiscrimination by employer in selection of supervisory personnel, evidence that due to former segregation of jobs it had taken blacks some time to learn range of job skills necessary to perform such supervisory duties; before such justification could be considered, employer would have to prove that unpromoted blacks did in fact lack necessary skills; that needed skills were justified by business necessity; and, if employees could show that failure to gain such skills was result of neutral policy which perpetuated past discrimination, employer would have to show that policy was justified by business necessity. Civil Rights Act of 1963, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

30. Civil Rights key 44(4)

Trial court in employment discrimination action erred in finding that plaintiffs' statistics did not constitute proof of racially discriminatory promotion to supervisory positions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

31. Civil Rights key 9.10

Use of subjective promotion criteria by mostly white formen is ready mechanism for racial discrimination in promotions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Courts key 406.3(13)

Trial court in employment discrimination action was not clearly erroneous in concluding, on basis of only subjective opinion evidence, that plaintiffs had failed to prove that blacks were assigned to less desirable tasks within each job class in employer's welding department. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

33. Courts key 406.3(13)

Trial court's conclusion in employment discrimination action that individual plaintiffs were not discharged for racial reasons, but for insubordination, was not clearly erroneous. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34. Courts key 405(14.14)

In employment discrimination action brought under Title VII of Civil Rights Act of 1964, in view of notice of appeal, employer's attempt to limit issues on appeal solely to those presented by single employee in his individual capacity were without merit. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

U. W. Clemon, Birmingham, Ala., Marilyn Holifield, New York City, for plaintiffs-appellants.

John C. Falkenberry, Birmingham, Ala., Michael H. Gottesman, Washington, D. C., for U. S. Steelworkers, and others.

C. V. Stelzenmuller, Birmingham, Ala., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard Inc.

Appeal from the United States District Court for The Northern District of Alabama.

Before COLEMAN, CLARK and GEE, Circuit Judges.

CLARK, Circuit Judge:

This Title VII case raises claims that the very substantial, good faith efforts of the employer and union working together to end racially segregated working practices still fall short of eliminating the present effects of past discrimination for many black workers. The central attack is on a continuation of departmental seniority. The district court after a full hearing prepared a detailed memorandum opinion reasoning that the steps taken constituted sufficient complaince with Title VII. Principally because that result was based on a prima facie case and other burden of proof concepts which did not fit this case, we vacate the judgment appealed from and reverse for further proceedings, including reconsideration of appropriate backpay and other relief.

I. FACTS[1]

Pullman-Standard, a division of Pullman, Inc., is the world's largest manufacturer of railway freight cars and parts. Operations at its Bessemer, Alabama plant are geared to special orders, rather than the production of an inventory, and accordingly are conducted much like a custom steel fabricating shop, though on a larger scale.[2] This method of production, coupled with sporadic market demands from the railroad industry, results in frequent and dramatic fluctuations in the level of employment.[3] Since the early 1940's, most[4] of the production and maintenance workers at Pullman-Standard's Bessemer

plant have been represented by the United Steelworkers, which also hold representation status at Pullman-Standard's other three plants; and key provisions dealing with seniority rights are largely covered by local rules at the individual plants rather than by the company-wide triennial collective bargaining contracts.

The production and maintenance jobs at Pullman-Standard, over a hundred in number,[5], are divided among 25 different United Steelworkers departments of varying sizes.[6] In addition to these departments there are two Machinist Union departments and an additional United Steelworkers department having only one employee. All assignments to departments are made by Pullman-Standard. Each job has a specified job class (JC) level, which determines its relative ranking in base pay in comparison to other jobs.[7] All but two departments, Janitors and Template, have more than one job classification; and most, but not all, classifications will be worked by more than a single employee during peak employment periods. One such job (Welder) sometimes is worked by over 500 employees.

Under the local rules at Pullman-Standard, seniority is measured by continuous service in a particular department and is exercised in competition with all other employees in that department, there being no lines of promotion or progression in any department. Seniority rosters are maintained by department; and departmental age is basically the sole criterion used to determine who is rolled back or laid-off in the event of reductions, and who is recalled or promoted (assuming ability to do the work) in the event of force increases or other vacancies, in the department. It is somewhat inappropriate to talk about "permanent jobs" at Pullman-Standard, except perhaps with respect to the most senior employees in the department; for the constant fluctuations in job requirements and employment levels cause frequent movement of employees from one job to another. While the seniority rosters do indicate a job

classificaton for each employee, these designations do not reflect his[9] permanent job, but rather constitute a recognition by the company that the employee has satisfactorily performed the job and is thereby protected under the collective bargaining agreement against rejection in favor of a junior employee on the factor of relative ability. The rosters are updated annually as of June 1st; and frequently only the highest job class which an employee has satisfactorily performed is shown for him.

From the study of payroll information for the 18-month period ending June 1974, it appears that 49.5% of the work force is black, a ratio which is comparable to that which existed in June 1965.[9] Understandably, plaintiffs, do not assert that Pullman's initial hiring policies, as such, are now or ever have been racially discriminatory.[10] Plaintiffs do, however, contend that assignment of new hires to the several departments was discriminatory, and continued so for several years following the passage of Title VII. Further, the plaintiffs contend that prior to June 1965 a number of the better jobs, including supervisory positions, were "white only" and a number of the lower-paying jobs were "black only." Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated, and remained so into the mid-60's, not by formal agreement to that effect, but under a custom and practice which the company condoned, if not approved.

In early 1965, spurred by an arbitration decision which opened up the then all-white Rivet Driver Job to blacks,[11] the company began implementing a program to eliminate barriers to advancement by blacks and, in general, to conform to the impending requirements of Title VII where possible infractions were detected. Black buckers and welder helpers were given trials to ascertain their abilities as rivet drivers and welders, respectively.

Beginning in June 1965 black employees were appointed as hourly foremen. A reporting system of hires and promotions was undertaken, as were efforts to recruit blacks for the more highly skilled positions. In early 1966, an agreement was made with the union to utilize seniority in the filling of temporary vacancies.[12] Negotiations were commenced in 1968 with the Department of Labor, Office of Federal Contract Compliance (OFCC), which led in January 1969 to a conditional memorandum of understanding (OFCC agreement) designed to enhance opportunities for blacks.[13] Although this memorandum never became fully effective due to lack of union acceptance, Pullman-Standard through its Contract Compliance Officers—one black and one white—began encouraging black employees in certain "low ceiling" departments to transfer to other departments and monitoring the filling of temporary vacancies to assure a fair allotment to black employees. Black employees and their families were encouraged to participate in vocational education at the company's expense, a program that has been particularly significant in the training of black welders.[14]

In May 1972, Pullman-Standard entered into an agreement with the Department of Labor to serve as a corrective action program and to bring its employment prctices into compliance with Executive Order 11246 as amended.[15] Of the many provisions in the 25-page OFCC agreement, the most significant to the issues in this case are those relating to interdepartmental transfers. Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments (Template, Powerhouse, Airbrake Pipe Shop, Inspection, and Plant Protection); and those hired before April 30, 1965, who had been assigned to four "low ceiling" departments (Janitor, Die & Tool, Truck and Steel Miscellaneous) are given preference for vacancies arising in any of the departments.[16] These transfer

rights are without limit as to time; and, when exercised, the employee vies for promotions in the new department using his total plant age. For layoff and recall purposes, the employee is given at the time of the transfer the option either to take his plant age into the new department or to keep accruing seniority in his old department while building new age for such purposes in the new department. Retreat rights to the employee's prior job are provided should he fail to qualify for at least a JC 4 job or is disqualified for a promotion in the new department; and in such event the employee may have the right to go to another department rather than return to his original one.

The trial court had before it for determination four claims of class discrimination[17] and claims of individual discrimination by two employees. The class issues were:

> (1) Does the system of departmental seniority, even with the changes made under the OFCC agreement, perpetuate the effects of past discrimination in the assignment of black employees among the various departments?[18]
>
> (2) Has there been discrimination in the assignment of work to persons having the same job title or in the assignment of jobs having the same JC level to the persons entitled to jobs of such JC level?
>
> (3) Has there been discrimination in the promotion of persons to supervisory positions?
>
> (4) Has there been discrimination in the failure to post publicly a list of changes in assignments?

One of the named plaintiffs, Louis Swint, and an intervenor-plaintiff, Clyde Humphrey, each claim that their discharges by the company in May 1971 and November 1972, respectively, were racially motivated or were in retaliation for their having earlier filed charges with the EEOC.[19]

II. DEPARTMENTAL SENIORITY

The district court upheld the use of departmental seniority at Pullman-Standard on the premise that this practice may only be found to have perpetuated the effects of past discrimination when there has been a showing of prior discrimination in the assignment of black employees among departments by exclusively or disproportionately assigning white hires to higher-paying departments and black hires to lower-paying ones. This general principle, though correct in the abstract, cannot be translated into an absolute requirement that a plaintiff prove economic harm before he has established a prima facie case of racial discrimination in hiring assignments. Because the effect of the district court's approach improperly placed that burden on plaintiffs in this action, it found no unremedied discriminatory hiring assignments. Its conclusion based on the assumption that the plaintiffs had not shown that they were assigned to less desirable departments must be reversed and the issue remanded to the district court for reconsideration and resolution in a manner not inconsistent with this opinion.[20]

The lower court concluded that: "With the exception of nine departments, the evidence does not indicate any past or present policy of racially discriminatory assignments." This conclusion primarily rested upon the district court's finding that although in 1965 only five departments had racial compositions approximately equal to the ratio for the total of all departments, "there was no pattern of favoritism to whites in the departmental assignments." At the heart of this finding is a chart constructed by the lower court which ranked each department according to job class range.[21] The chart reveals that a greater percentage of blacks than of whites were employed in 1965 in departments with higher job class ranges. Because the chart is crucial to the district court's approval of departmental seniority, we must carefully and completely analyze the attacks made on it by plaintiff.

A. Was the Chart Wrong?—The Clearly Erroneous Attack

Plaintiffs contend that the theory and use of the chart give an incomplete and misleading impression and that fact findings based on it are clearly erroneous. The chart is designed to show departmental desirability. It accumulates the percentages of blacks and whites in each department in three ways. Column I shows all Steelworker departments except Boilerhouse, Column II additionally excludes the nine departments affected by the OFCC agreement, Column III further takes away the maintenance and welding departments. The accuracy of such an accumulating percentage chart directly depends upon the accuracy of the departmental rankings. Plaintiffs argue that the ranking of departments in the chart is arbitrary and inaccurate for the following five reasons:

1) Departments were ranked by job class range.[22] Plaintiffs argue that the key factor, economic desirability, is much more a function of the number of employees who work in each job class than of a department's job class range. For example, the chart would rank a department with job class ranges 1-10 above a department with ranges 1-9; yet, a department with 100 workers in JC-1 and five workers in JC-10 is clearly not as desirable as a department with five workers in JC-1 and 100 in JC-9. Plaintiffs' propose that any charting of desirability should rank departments by median job classes.[23] Not surprisingly, plaintiffs' proposed charting shows that blacks were disproportionately assigned to less desirable departments. Pullman-Standard replies that medians are also inaccurate indicia unless substantiated by various statistical techniques (such as standard deviations) which have not been supplied in this instance.

2) The plaintiffs contend the court arbitrarily excluded higher, sparsely populated job classes in some departments. The

Welding Department has a JC-16 job class which has less than 1% of the department's employees; therefore, the court excluded JC-16 from the Welding Department's job class range. If the JC-16 job class were included in the Welding Department job class range, the department would rise from rank 16 to rank 4 on the chart. Since Welding is the largest department and one in which whites are disproportionately represented, the accumulated percentages would be changed significantly by this move. Plaintiffs argue that the Wood-Mill, Wood-Erection, Paint, and Steel Construction departments all have less than 1% of their employees working in the top job class; however, the 1% job classes are included in those departments' ranges. The last three departments are particularly important because they are disproportionately black departments which by across-the-board equal treatment would be shown to be less desirable than presently reflected by the chart. Pullman-Standard, however, logically argues that the special statistical treatment given the Welding Department is entirely justified because the JC-10 to JC-16 jump (from the highest job class listed to the unlisted 1% job class) is much greater than the jump in the four departments where 1% job classes were included. Also, Pullman-Standard contends Welding is by far the largest department and deserved the special consideration given by the court's Column III to ensure that it did not unfairly skew the chart.

3) Plaintiffs object to the exclusion from the chart of the Die & Tool IAM, Maintenance IAM, and Boilerhouse departments. Two of these departments are covered by the Machinists instead of the Steelworkers Union. Therefore, they do not have job class ranges and could not easily be assigned ranks on the chart. However, no attempt at even estimating relative rank was made by the court. Boilerhouse is a Steelworker's department whose only worker has always been a JC-10 white employee. Plaintiffs argue that these departments are mostly segregated and are higher paying; therefore, their exclusion directly affects the chart and the conclusions drawn from it.

4) Plaintiffs point to departments which have the same job class ranges. These departments are arbitrarily assigned a rank on the chart even though they are nominally equal. The most obvious example is right in the middle of the rankings where five departments with ranges of JC-1 to JC-11 are listed in order. These ar large departments which total 1/3 of all workers. Two of these departments are heavily black. One contains more blacks than any other department. The ranking of these departments among the five could affect conclusions drawn from the chart.

5) Plaintiffs assail the chart's accumulating percentage columns. Plaintiffs are especially concerned with Column III which provides the strongest support for the court's findings. The exclusion of Welding[24] and Maintenance was made because of special technical skills needed in some of the job classes in these two departments. But, nowhere in the opinion is there the kind of business necessity finding which would be essential to allow a special-needed-skill exclusion to keep these departments from being considered.[25] Also, there is no finding of the nature of these needed skills nor whether they are necessary only in the higher job classes. Finally, if the skills are only needed in the higher job classes, there is no finding as to whether they could be gained while working in the lower ones, either with or without additional special training.[26] The court also found that plaintiffs had failed to prove that blacks were qualified to enter either department. This, however, reflects an incorrect placement of the burden of proof. The question of absence of qualifications is relevant, but only *after* the determination that a pattern of discrimination has been shown; and then, the burden is on the defendant to show the absence of qualifications.[27]

Prior to the desegregation of the Welder job class in this department, whites were able to take a test (usually after having served as a welder's helper and learning the skill) without either

prior formal training or experience to determine whether the employee was qualified to be a welder. Since blacks have been allowed to become welders, the company has required that only those persons with either prior experience or formal training could take the qualifying test. Plaintiffs argued that this should be considered as a facially neutral requirement which in reality operates to perpetuate past discrimination. Since there is some question as to whether this final issue was squarely presented below and since its resolution would not control our decision, we pretermit its resolution.

[1] The concept of plaintiffs' attack on the district court's conclusion that blacks were not disproportionately assigned to less desirable departments based on the chart's deficiencies is framed in terms of a clearly erroneous factual determination. It fails because the district court did not treat the chart as plaintiffs contend. The court made two factual findings relevant to this inquiry. First, the court found that the *chart shows* that blacks were not disproportionately assigned to less desirable departments. This factual finding is correct to a mathematical certainty. Second, the lower court found that the chart was a "rough index of earnings potentials in the absence of other more reliable data, such as average earnings or average job class worked." In other words, the district court recognized that the chart had problems. Its "rough index" conclusion also is not clearly erroneous. The reason plaintiffs' clearly erroneous attack miscarries is that they misread the court's ultimate legal conclusion as resting upon a factual finding that the chart was both accurate and not arbitrary.

Despite our holding that the district court did not make an erroneous factfinding in its direct references to the chart, it is clear that plaintiffs valid attacks on the structure of the chart as discussed in detail above do impugn the credibility of the court's ultimate conclusions based on departmental desirability.

B. Less Desirable Assignments—Prima Facie Case

[2] Plaintiffs in successful Title VII cases have uniformly been able to establish that their assignments produced diminished wages.[21] When today's proof was ruled insufficient to demonstrate loss, a novel question was squarely presented. To resolve it requires resort to the statutory language and case analysis of legislative purpose. When this path of reasoning is followed it leads to the conclusion that a Title VII plaintiff does not have to show economic loss to prove discrimination.

The district court concluded that plaintiffs' failure to show that class-wide economic harm resulted from the departmental assignments made meant that no prima facie case had been established. This legal deduction is inconsonant with the Act and its interpretative cases. The Title VII gravamen of the complaint is that departmental seniority perpetuated past discrimination. The key for this case is whether there was past discrimination, *i.e.*, that Pullman-Standard discriminated on the basis of race in making assignments to departments. Going further and requiring plaintiffs to prove that past assignment practices produced lower pay checks is contrary to law and precedent. The district court relied on *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) for its conclusion that economic harm from departmental assignments must be part of plaintiffs' prima facie proof. This reliance is misplaced. These cases and our contemporary decision in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) are cases in which the plaintiffs had clearly demonstrated that the defendants had assigned them to lower paying positions. When we recognized that the proof of such lower pay confirmed the existence of proscribed discrimination we did not mandate this element as a part of the prima facie case proof every Title VII plaintiff must make.

Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm.

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) and (2).

In the seminal departmental seniority case, *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va.1968), the court made the general observation that employees in the predominately black department were usually paid less than employees in the two predominately white departments. However, a comparison of the wage ranges in all three departments showed one white department offered more and one less pay than the predominately black department.[29]

Notwithstanding this wage range proof and the fact that *Quarles* was specifically requesting a transfer to a department with a lower range than the department in which he worked, the court found that past discriminatory departmental assignment

practices were perpetuated by departmental seniority. While *Quarles* does not explicitly hold that a prima facie case was made without showing economic harm, it necessarily ruled that prima facie case was proven even though wage or job class range showed the predominately black department was not the least desirable.

In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) the appeals court reversed the trial court's refusal to find that a Title VII violation had been established. The district court had placed on plaintiffs the burden of proving that the Labor Department was the least desirable department, then held that the burden had not been met by proof which showed racially disproportionate assignments of blacks to the Labor Department despite the fact that many jobs in that department paid less than jobs in most of the plant's predominately white departments. The Eighth Circuit reversed this burden placement. In a footnote it declared that where departmental desirability might be relevant defendants must carry the burden of showing blacks had been assigned to a more or an equally desirable department. Speaking more broadly, the court relied on our decision in *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972) (Hayes II) to hold that it was more important for the court to assure discriminatorily assigned employees had the opportunity to bid for jobs denied them because of race than to determine subjective factors of departmental desirability. Although the appeals court's principal determination was that the subjective evidence relied on did not establish the department to be the plant's most desirable place to work, its opinion leaves no doubt that departmental desirability is not an essential part of a plaintiffs' prima facie proof in a case such as this.

In *Hayes II* this court reviewed a lower court's determination that a departmental transfer system cured all possible perpetuation of past discrimination. The plaintiff United States unques-

tionably had established a prima facie case of racially discriminatory departmental assignment and as part of that proof had shown general economic harm to the affected class. However, one substantial issue in *Hayes II* concerned the defendant's contention that justification for not including several departments in the group of departments affected class members could transfer into could be found in the fact that the wages in those departments were "generally lower" than the departments in which affected class members were presently employed. The court ordered that qualified blacks be given an opportunity to transfer into these economically less desirable departments because "the Civil Rights Act provides for a job notwithstanding its lower pay or other disadvantages." *Hayes II*, 456 F.2d at 118.

In *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721, 723 (8th Cir. 1973), the Eighth Circuit concluded simply that "statistics which show segregated departments and job classifications establish a violation of Title VII." Absent a single statement regarding either objective or subjective economic desirability the court found a Title VII violation. The court expressed concern because the blacks had suffered "the indignities of segregation" and ordered complete relief including transfer rights and departmental merger. *Id* at 726. This case clearly indicates that economic harm is not a necessary element of a prima facie case.

The same district judge in *United States* v. *United States Steel*, 371 F.Supp. 1045 (N.D.Ala.1973), after finding that a prima facie case of racial discrimination had been made, presumed damages to a particular subclass for purposes of injunctive relief.[9] The judge then denied back pay in *U.S. Steel* because plaintiffs had not proven harm caused by discrimination.

The focus of our appellate reversal of this latter burden assignment in *U.S. Steel* was not on whether sufficient evidence

had been presented to establish a prima facie case of discrimination nor on the presumed damages for injunctive relief, but rather focused on the erroneous assignment to plaintiffs of the burden of presenting evidence sufficient to justify a backpay award to the class.

The backpay issue must of course face the causal relation between discrimination and proof of economic harm. We make reference to this prior action not only because of its presumption of damage from racially skewed assignments, but also because it held that economic harm was not even a required part of a backpay prima facie case unless the *defendant* had convincingly brought the issue into question.

A holding that plaintiffs here may be entitled to relief absent showing harm to their pocketbook is analogous to the situation which exists in Title VII *failure -to-hire* cases. Courts uniformly award class-wide relief without any showing that other jobs available in the community were less desirable than the jobs the defendant refused to make available.[31] Discriminatory-departmental-assignment Title VII cases are neither more nor less than failure-to-hire cases. The failure to hire here is a failure to hire into a particular department.[32] Just because the other job the plaintiff received when he was discriminatorily prevented from being hired into one department was in the same plant is not a sufficient reason for increasing the plaintiffs' prima facie burden of proof.

Title VII of the Civil Rights Act prohibits all forms of racial discrimination in all aspects of employment. The degree of discrimination practiced by an employer is unimportant under Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act.

Rowe v. *General Motors,* 457 F.2d 348, 354 (5th Cir. 1972).

[3] The plaintiffs in the instant case were found to have failed to establish a prima facie case, for both injunctive relief and

backpay purposes, because they did not show economic harm—*i.e.*, that they were disproportionately assigned to less desirable departments. *Quarles, N.L. Industries, Hayes II, Reed, U.S. Steel,* and *Rowe* all lead us to the conclusion, buttressed by the broad statutory language, that, at least for the purposes of injunctive relief, plaintiffs need not show that they were assigned discriminatorily to *less desirable* departments in order to prove a prima facie case of racial discrimination.

For purposes of backpay relief, *U.S. Steel* holds that economic harm is not required to be shown as an element of a prima facie case unless the defendant has shown "convincingly" by "statistically fair exhibits" that the class earned "at least as much as a plant-seniority comparable group of whites." The district court's desirability finding was based on a "rough index" chart which it used in "the absence of other more reliable data." As demonstrated above, the chart contained patent inaccuracies. It does not amount to a convincing showing by a statistically fair exhibit of earnings equality.[33] In addition, the chart did not even attempt to correlate seniority-comparable workers. In the instant case, therefore, the defendant's evidence did not "draw into substantial question the group's entitlement to [backpay]."[34]

[4, 5] Without attempting to lay down a rule for all cases, it was error to require plaintiffs to prove economic harm as an element of their prima facie case of racially discriminatory departmental assignment.[35]

C. Scope of the Prima Facie Inquiry on Remand

Since the district court was in error when it ruled that plaintiffs had failed in their proof the case must go back for further consideration. Errors apparent in prior procedures indicate that we should now define the prima facie inquiry to eliminate the

likelihood they would recur on the reconsideration we now mandate. It would be inappropriate for this court to decide here, whether a prima facie showing was made. Not only do we not decide it, but also we do not intimate how it should have been resolved. This evidence-weighing process should be conducted by the district court in the first instance, especially since the question is so obviously a close one. We emphasize that despite our directions as to procedures and parameters on remand, we intimate no decision as to what the district court's ultimate conclusion should be.

Plaintiffs argue that previously the court limited its inquiry only to Steelworkers Union departments, exclusive of such departments as were covered by OFCC, plus Welding and Maintenance. Also, they contend that neither pre-'65 policies of discrimination nor statistics showing overall lower job class assignments to blacks were sufficiently considered. Finally, they claim undue weight was given to a 1972 yearly wage comparison. The trial court's opinion does not make it apparent that the weighing of this evidence ever actually took place (although several elements were discussed). The lack of proof of harm necessarily sidetracked the prima facie case conclusion.

[6] The most important aspect of determining whether a prima facie case has been proven is to identify the proper scope of the evidentiary examination. The authorities speaking to this scope all conclude that the question should be whether the class has established a history of broad patterns of plant-wide racially discriminatory departmental assignments.[16]

> [T]he *class* must demonstrate a prima facie case of employment discrimination. Sometimes statistical evidence alone will suffice; on other occasions live testimony or additional exhibits may be necessary. At all events, however, the stress . . is upon demonstration of the defendant's broad employment policies and practices, the defendant's rebut-

tal and business necessity defenses, and the inferences which remain at the close of the evidence.

United States v. *United States Steel,* 520 F.2d 1043, 1053 (5th Cir. 1976); *citing, United States* v. *T.I.M.E.—D.C.,* 517 F.2d 299, 315-16 (5th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40, 53-55 (5th Cir. 1974); *United States* v. *Hayes International Corp. (Hayes II),* 456 F.2d 112, 120 (5th Cir. 1972).

[7] During the class-wide inquiry, commonly referred to as phase one,[17] the court must also define the limits of the class actually entitled to relief and determine the relief necessary. Composing the makeup of the affected class is usually one the more difficult Title VII tasks.[18] The temptation to expedite the handling of a complicated Title VII case such as the one before us here urges a court to combine the determination of the prima facie case phase and the delineation of the affected class. These are separate problems and must be handled separately.[19] The combination of a prima facie case determination and an affected class limitation inevitably results in a narrowing of the broad prima facie case inquiry or broadening of the affected class delineation. Neither result is permissible. Title VII adjudicatory procedures are complex. In this maze of shifting of burdens and first-narrow-then-broad areas of trial court concern, it is particularly important that a court proceed only one step at a time.

The first inquiry should be whether a prima facie case has been shown. In the instant case that requires us initially to focus on whether a history existed at Pullman-Standard of broad patterns of plantwide racially discriminatory departmental assignments.

(1) *Disparate Department Assignments*

[8, 9] Although there are 28 departments at Pullman-Standard, the court's opinion and the chart from which it draws its major conclusions did not consider the two Machinists Union departments, the single-member Boilerhouse department, the departments covered by the OFCC agreement, and the Welding and Maintenance departments. In addition, the court found five of the remaining departments to be fairly statistically balanced. Thus, under its decisional framework, what was left was to decide whether a showing that nine departments are racially imbalanced makes out a prima facie case of racial departmental assignment. On remand, this entire analysis must be discarded. The appropriate evidentiary examination should focus on the *plant as a whole* to determine whether there have been racially discriminatory assignments.[40]

Many courts have found departmental assignments to be discriminatory where statistics showed absolute or almost absolute one-race departments.[41] The inference of discriminatory assignment in such complete exclusion or only token inclusion situations is much more direct than we have here.[42] But it is not necessary to show complete or substantially complete segregation by departments.[43] When the departments are racially mixed but simply do not represent the plant-wide balance, the inference of discriminatory assignment is much more difficult to draw. If the focus were only on the statistical racial disparity in nine departments, one could not conclude that a prima facie case existed. However, these statistics need not be viewed in this sort of vacuum. There exists a great deal of other evidence in the record which must also be entered onto the balance. It is this additional evidence which must be considered in the first instance by the trial court so that the balance can be struck according to the inferences that court chooses to draw.

(2) *OFCC Departments*

[10, 11] In its initial prima facie case inquir the court examined only those departments not covered by the OFCC agreement. The logic of its reasoning was sound, as far as it went—discriminatory assignments which are shown by these departments' statistics showing heavy segregation have been cured by OFCC.[44] But, the scope of the court's examination should have continued to be whether there had been past discriminatory racial assignments instead of stopping at answering whether the most glaring past discriminatory racial assignments were no longer frozen in by department seniority. The face that discriminatory assignments were made to these nine departments is clearly probative on the issue of whether plant-wide racially discriminatory departmental assignments existed. In this case where percentage discrepancies could indicate subtle discrimination or no discrimination in the remaining departments, the elimination of the unmistakable discrimination in these nine departments skews the analysis. An inference can be drawn from this proof that discrimination in departmental assignments stopped at these most segregated rosters. Another conclusion is that every department was involved. Whether either of these or some inbetween conclusion should be drawn will most probably depend on the other evidence presented and is for the trial court. But, the evidence must be assayed for this purpose to keep the process right.

(3) *Machinists Union Departments*

Similarly, the racial makeup of the Machinists Union department should also be considered in the prima facie balance. Pullman-Standard made assignments to these departments as it did the others. Although the court states in a footnote that the Machinists Union departments are included in the OFCC agreement, it appears that the departments were not included as all-white departments into which any blacks hired before the cutoff

date could transfer. Instead, the departments appear to be opened only to the extent that blacks in all-black departments could transfer into them. The actual effect of the OFCC plan on Machinists Union departments must be clarified on remand. Plaintiffs contend the Machinists Union departments were all-white and should have been included in the OFCC agreement as transfer-in departments for any black hired before the cutoff date, not just blacks who were assigned to all-black departments. Plaintiffs claim that these departments were still all-white in 1974. The district court made no finding regarding the racial composition of these departments in 1965 or 1974 and drew no inference from their composition. On remand it must do so. If blacks were excluded from these departments in the past, the departments must be included in the relief ordered by the court as departments to which any black hired before the cutoff date may transfer.

Moreover, the racial makeup of these departments in 1965, especially if they were all-white and high-paying departments, could be probative of plant-wide discriminatory assignment. The broad plant-wide scope of examination required during the prima facie case determination requires that this evidence be evaluated.

(4) *Welding and Maintenance Deaprtments*

[12] The court indicated that special skills are required for Welding and Maintenance departments and, therefore, they should not be considered as to whether there was plant-wide racially discriminatory departmental assignment. This conclusion would only be justified if the defendant could show that blacks were excluded from these departments because they lacked minimum qualifications and if such qualifications were justified by a business necessity.[45] Neither finding appears in the district court's opinion. Unless these findings can be made, the racial makeup of both departments must also be considered in determining whether a prima facie case has been shown.

(5) *Past Policies of Discrimination*

[13] Plaintiffs contend that prior to 1965 blacks were discriminatorily assigned to departments and were discriminatorily assigned to lower paying job classes within each department. They point out that in 1964 98.4% of the blacks and only 15.8% of the whites were qualified to work in job classes 8 or below, while 79.7% of all whites were in job classes 10 or above. Since arbitration decisions in 1965 eliminated upward mobility barriers for blacks within each department, it would be logical to assume that in the 8 years between 1965 and 1973—if the disparity in job classes had truly resulted from the limitation of upward mobility within each department and not from discriminatory assignment to lower paying departments—that there would be substantial improvement in these figures. But, plaintiff's exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10. If this evidence is not rebutted by substantial evidence that blacks were not qualified to progress within their departments, it indicates that blacks were assigned to less desirable departments and should be weighed in determining whether a prima facie case has been made.[46] The district court not only rejected consideration of the evidence, but also inexplicably discussed completely different figures from those shown in the record. If it is pertinent, this statistical discrepancy should be clarified on remand.

[14] The district court recognized that until mid-1965 job classes were segregated by Pullman-Standard. Plaintiff states that 134 out of 148 job classes were all-white or all-black. The district court found that this job class segregation phenomenon has substantially dissipated and, therefore, did not give this past practice any weight. However, the prior history of discriminatory job class assignments is clearly relevant to the issue of whether the present discrepancies in departmental assignments were part and parcel of a broad scheme to treat

black and white workers differently. Historical policies of racial discrimination have often been used by other courts as indicia of plant-wide discriminatory conduct.[47] The weight to be given and the inferences to be drawn are for the trier of fact.

(6) *Average Yearly Wage*

[15, 16] The district court buttressed its conclusion that there was no perpetuation of discriminatory racial assignment at Pullman-Standard by referring to 1973 wage proof which showed that the gross yearly income of blacks from Pullman-Standard employment and unemployment benefits was 96.8% of that of whites from the same sources.[48] These statistics must be carefully examined. *United States* v. *United States Steel,* 520 F.2d 1043, 1054 (5th Cir. 1976), teaches that such wage parity is relevant only if groups with similar seniority are being statistically compared.[49] The figure used by the district court does not attempt only to compare groups of blacks and whites with relatively equal seniority. This is especially pertinent here because this record indicates that in general blacks have more seniority than whites at Pullman-Standard; if discrimination had not been perpetuated, blacks reasonably might be making more than whites. In addition, this yearly salary parity does not include two other extremely relevant factors: amount of overtime worked and number of weeks or hours worked. Because the figures did not consider seniority, overtime, and time worked, they were not a reliable indicia of even rough wage parity in 1973.[50] Their use by the district court was not proper.

(7) *Summary*

The district court must examine the evidence presented concerning the plant as a whole to determine whether a prima facie case of discriminatory departmental assignment has been made. If a prima facie case of past discrimination has been shown,[51] the court must then determine if it has been perpetuated. If such a determination can be made, then as a second and separate step

the court must limit the broad certified class to appropriate affected classes or subclasses and order necessary relief.

D. Perpetuation of Past Discrimination

[17] The district court did not find any discrimination which could be perpetuated by the departmental seniority system in use at Pullman-Standard. Although it did find that the nine departments included in the OFCC plan were previously completely segregated, it determined that the OFCC provision allowing carryover departmental seniority for transferring discriminatees broke down any barriers for these blacks in reaching their rightful place in the plant. The approval of the OFCC plan (with slight expansions in effective dates) was a proper judicial recognition that if the departmental seniority system in effect at Pullman-Standard was left to function without modification, it would perpetuate past discrimination. The case law precedent is legion if not unanimous in holding that departmental seniority plans similar to that in use by defendant do perpetuate past discrimination.[11] If the trial court should find that the plaintiff has shown plant-wide discriminatory racial assignment has been perpetuated by the departmental seniority system, this barrier to transfer, which bars blacks from their rightful places in the plant, must fall.[12]

E. The Limitation of the Affected Class

Before the Court is able to order appropriate relief, however, it must define the plaintiff class affected by this discriminatory conduct. In a factual milieu such as that provided at Pullman-Standard, the two limiting factors on the definition of the affected class will be the number of departments covered and the hiring date upon which discriminatory departmental assignment ended. These two considerations—department and end date—will define the parameters of the affected class.

(1) *Affected Class Departmental Limitation*

[18] The purpose of this second Title VII decisional step is to narrow the certified class only to those members most probably entitled to relief.[14] In performing this task the court should first delineate the elements of the plaintiffs' proof which were sufficient to make out a prima facie case of racially discriminatory departmental assignment. If these elements are clearly and convincingly inapplicable to a particular department, the department must be eliminated from membership in the affected class. In a completely segregated departmental situation, this limitation by departments may be easy.[15] In mixed department cases, however, the court may choose to order relief which applies plant-wide to all black employees hired before a certain date.[16]

Of course a defendant may also attack the inclusion of a particular department for reasons entirely separate from whether the elements of the plaintiffs' prima facie case are applicable. For example, proof that there have been specific requests by all black applicants not to be assigned to a particular department could well exclude a department from membership in the affected class. The burden of proving departmental exclusion in this latter type of situation would be on the defendant.

(2) *Affected Class Time Limitation*

[19] If the court determines that plant-wide discriminatory assignment exists, it must limit the class to all blacks hired before the date when this historical discriminatory assignment process ceased.

[20] Plaintiffs attack the dates used by the lower court when it expanded the time limitation on the departments under the OFCC agreement. The court used as the significant date the date when the first black or white was appointed to the all-white or -black department respectively. Token integration, however, does not signal the end of discrimination. These dates must be

reconsidered. It is improper to end affected class membership at a date upon which the first black or white was assigned to the department unless this date signifies the end of the discriminatory practices.[17] Otherwise, the court must use a date which clearly signifies the end of a racially discriminatory departmental assignment.

Should the affected class be broadened on remand, the same analysis must be used whether the court chooses to limit the hiring date time factor of the affected class on a department-by-department or on a plant-wide basis.

III. APPROPRIATE RELIEF

If there ever was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination. Proof of invidious practices becomes more difficult as the ability to separate the real violation from the unfounded suspicion grows harder. This is especially so since many employers and unions, including Pullman-Standard and Steelworkers, have made substantial good faith efforts toward eliminating racial distinctions for the work force. Frequently, bargaining which results in minority employees being hired and allowed to progress in their jobs free of discrimination does not accord the Act's intended relief to older black employees. Although the temptation to enforce the accomodation reached by the parties most directly interested is great, it remains part of the court's task to see that these older workers, who bore the brunt of past disparities, do not continue to work at jobs their white peers would not have and for wages less than those paid to recent hires who were not put down because they were black.

A. Red Circling

Red circling is the mechanism by which the wage rate of an affected class member who transfers goes with the man—even though the new department to which he moves would pay the transferee a wage rate less than the old one. The purpose of the remedy is to protect the employee from financial loss until he has an opportunity to learn the necessary skills to progress in the new department to a wage equal to his old department scale.

The district court held that red circling in the instant case was unnecessary for six reasons: (1) "[V]irtually all of the jobs in the transfer out departments have lower job class levels than the lowest jobs in the transfer in departments." (2) There are no lines of promotion or residence requirements to impede promotion in new departments. (3) Frequent manpower fluctuations may create new opportunities. (4) Some of these manpower fluctuations will obviate old wage rates. (5) No training is provided for new jobs. (6) The key reason for affected class members turning down transfer opportunities is apprehension over retreat rights and not the possibility of diminished wages.

Should the court find plant-wide discriminatory departmental assignments were perpetuated by the departmental seniority system, several of the six reasons discussed above would be inapplicable. However, since we hold that some kind of modified red circling system probably will be necessary even if the affected class is not expanded, we do no more than mention this contingency which an expanded affected class would present.

[21] The red circling remedy was originally developed to eliminate impediments to discriminatees rising to their rightful place in a plant. Therefore, whenever the possibility exists of receiving lower wages in the new department, red circling must be ordered. The remedy must continue until the transferee had had an opportunity to progress to the new department job which he would have held but for the past discrimination. For

this reason, it is now clear that red cycling is a necessary element of a Title VII remedy in most,[58] though not all,[59] cases.

[22,23] The only situation where we have recognized that this part of the remedy would not be mandated is where the plaintiff is unable to show that the absence of red circling presents a practical impediment to *any* affected class member. *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 113 (5th Cir. 1975); *accord, Watkins* v. *Scott Paper co.*, 530 F.2d 1159, 1174 (5th Cir. 1976). The district court's major premises for refusing to order red circling were its conclusions that (1) "virtually all" affected class members will be able to transfer immediately to higher paying jobs and (2) the key reason for nontransfers has been apprehension over retreat rights and not lower wages. Neither reason appears to meet the *Stevenson* and *Watkins* standard. The test is not whether "virtually all" discriminatees will not suffer reduced wages. If *any* will suffer, red circling is appropriate. On remand, unless the district court determines that the plaintiffs have failed to show that *any* discriminatees would suffer diminished wages on transfer, red circling must be ordered.[60] This would also be true should the affected class be expanded on remand. Apprehension over retreat rights could only result from ignorance of the OFCC agreement's provisions. Full and complete retreat rights are guaranteed. Surely neither Pullman-Standard nor the union should or will allow ignorance of rights already conferred to operate as a bar to departmental transfer. When the fear over retreat rights has dissipated, the possibility of reduced wages surely will be seen as the major impediment to transfer. Neither of these considerations can pass the *no*-affected-class-member test.

The four other reasons given by the district court are insufficient to justify its refusal to order red circling.[61] However, the lack of on-the-job training and lines of progression along with frequent fluctuations in the work force indicate that the standard red circling remedy would be inappropriate and that some modification of that remedy is needed.

[24] The purpose of red circling—to eradicate the obvious impediment of lowered wages to transfer to a new department—is meant to protect the affected class transferees only until they have been in the new department a sufficient amount of time to have had a realistic opportunity to become recognized and listed as qualified to work in a job class which pays at least as much as the old department wage rate.

Job manpower fluctuations, which are particularly acute in some departments offering greater advancement opportunity, create problems for devising a remedy which will not go too far and convert the attempted remedy into a windfall. The lack of on-the-job training and lines of progression also present problems for the trial court. They are not ones appropriate for resolution or detailed suggestion here. Suffice it to say that if the remedy is required, it must be devised justly—but, if required, it must be granted despite difficulty in its formulation.

B. Posting

[25] The union contracts with Pullman-Standard do not provide for a formal bidding procedure or a posting of vacancies either plant-wide or department-wide. In fact, not even an after-the-fact notification of changes in assignments was required.[62] Pullman-Standard asserts that the absence of these formal notification and bidding procedure impossible and the posting of assignments unnecessarily burdensome. The plant operates on a "word of mouth"[63] and "personal observation" approach to the notification of job vacancies. In addition the union takes a very active role in monitoring employees' seniority rights.

Plaintiffs requested below that a plant-wide system of posting job vacancies be ordered for the Pullman-Standard plant. The court framed the issue as: "Has there been discrimination in the failure to post publicly a list of changes in assignment?" Its answer was that "the lack of formal procedures for notification neither discriminated nor perpetuated the effects of

any past discrimination against blacks." So addressed, the claim is limited to whether the notification system prevented blacks from taking full advantage of their seniority rights. The court's answer is not clearly erroneous. However, it only answers the questions of nondiscrimination and perpetuation of discrimination presented by the posting issue per se. The propriety of ordering posting to facilitate transfer rights has not been considered.

Not only must posting be examined to see if the lack of a formal system itself discriminates or perpetuates prior discrimination against blacks, but the ordering of a formal posting remedy must be considered as a part of the remedy which will facilitate the advancement of the affected class members to their rightful places in the plant. The illegal discrimination found at Pullman-Standard was racially discriminatory departmental assignment. We hold that the neutral departmental seniority system has perpetuated that discrimination into the present. Carry-over seniority, red circling, and backpay are parts of the total remedy. The need of a formal system of notification of plant-wide vacancies to make the remedy efficacious must also be reconsidered. If *any* affected class member would be prevented from exercising his transfer rights because the present non-system failed to notify him of a vacancy then some more formal system of notification must be ordered unless business necessity prevents it.[44]

C. Backpay

The district court did not award any backpay, and except for one small subclass of discriminatees no adjudication regarding backpay has been made in the instant case.[45] Plaintiffs' attack on the failure to award any backpay in this action is premature. The pretrial order of June 5, 1974 severed backpay claims for a subsequent trial should they be necessary.

The OFCC agreement identified five all-white departments and allowed blacks hired prior to April 30, 1965, to transfer into these departments with carry-over departmental seniority as vacancies occurred. The trial court ordered that the cut-off date for transfer into three of these departments, plant protection, inspection, and air brake departments, be extended until June 1, 1967, June 1, 1970, and June 1, 1971, respectively, to allow blacks who were discriminatorily prevented from being assigned to those departments adequate transfer rights. The court recognized that any blacks hired between April 30, 1965 and these new dates were entitled to backpay. However, it also recognized that no backpay would be necessary if there were no vacancies in these departments prior to transfer.

The court did not hold that there were *no* vacancies; instead, it held there were not enough vacancies to allow this class of employees at the bottom of the eligibility group to be assigned to these departments. Here the district court obviously had reference to the priority enjoyed by senior affected class members which would preclude workers in the expanded affected class from eligibility for transfer to one of these departments. This finding by the court is not clearly erroneous. However, the legal conclusion that the expanded class is not entitled to backpay must be reversed since it was reached using an erroneous legal principal.

[26] A finding of *no* vacancies in these departments would support a conclusion that no entitlement to backpay existed, as would a finding that all vacancies were filled by more senior discriminatees. The court did not make either clear-cut, absolute factual finding. Rather, it inferred that since there were so few vacancies and since the expanded affected class' priority was so low, they would have been precluded by more senior discriminatees. This inference is precluded by *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975).

Baxter requires a two phase backpay inquiry. During the first or general phase the class must show its entitlement to backpay. This is presumptively shown once employment discrimination has been found.[46] The second or specific phase allows each discriminatee to present the backpay claim to which he is presumptively entitled unless the defendant bears the burden of proving nonentitlement. A general inference of class-wide unavailability of vacancies is insufficient.[47] To avoid liability the defendant must show during phase one that no vacancies whatsoever were available or during phase two it must show that the particular discriminatees seeking backpay could not have been assigned to that department nor transferred to it because of the unavailability of vacancies they were eligible to fill.

Of course, we pretermit any indication of appropriate resolution of the severed claims for backpay. We would only note that if on remand the court should expand the affected class, substantial backpay issues would be raised.[48]

IV. SUPERVISORY PERSONNEL

The appointment of supervisory personnel at Pullman-Standard is done totally subjectively. There are no established criteria for selection of new foremen. The plant manager and superintendent choose department heads (C foremen) who in turn select track supervisors (B foremen), production foremen (A or salaried foremen) and hourly (temporary) foremen. Plaintiffs contend that prior to 1965 there were no black foremen. In 1966 the first black salaried foreman was promoted to one of the 143 existing salaried foreman positions. Four years later there were only nine black salaried foremen while there were 151 white foremen. At the time of trial there were 13 departments in which blacks had never been offered either salaried or temporary foreman positions. Since 1966 and until the time of this trial there were at least 59 salaried foreman vacancies. Only 12 of these were filled by blacks.

The district court essentially agreed that these statistics were correct but chose to focus on the selection of hourly foremen since they in turn formed the source group for the selection of salaried foremen. The court found that since 1965, 56 blacks — approximately ⅓ of the total number — have been selected as hourly foremen. Recognizing that this was a lower percentage than the approximately 50% of black personnel in the plant, the court found four factors which ameliorated the otherwise compelling inference of discriminatory promotion.

[27] 1. The court found as a fact that a greater number of blacks than whites were functionally illiterate and, therefore, were less likely candidates for promotion. Educational requirements which operate disporportionately to exclude blacks may not be used unless they pass Title VII validation and business necessity muster.[69] The court itself recognized in a footnote that it was not holding that some particular level of education was allowable under Title VII. Despite this recognized absence from the record of validation or business necessity proof, the court found this absence of functional literacy would render black employees "less likely" candidates for promotion. This non sequitur is impermissible.[70] Since no minimum educational requirement was proven legal under the strict guidelines of Title VII, the "requirement" may not be used as a generalized inference to explain why blacks were not potential supervisors.

[28] 2. The court found that 30 blacks and 17 whites have turned down hourly foremen opportunities since the mid-1960's. This, of course, is a legitimate item of rebuttal to a prima facie case. The most statistically pure representation of discrimination would be the percentage of black vs. white offers of promotion. A comparison of actual appointments with the number of turned down offers would enable the court, if the number of actual offers was not before it, to approach this statistically sterile measure.

[29] 3. The court concluded that due to pre-'65 segregation of jobs, it has taken blacks some time to learn the range of job skills necessary to perform supervisory duties. This justification for not promoting blacks to supervisory positions has been uniformly rejected by this court. Before such justification could be considered the defendants would have to prove that unpromoted blacks did in fact lack the necessary skills; that the needed skills are justified by a business necessity; and, if plaintiffs could show that the failure to gain these skills was the result of a neutral policy which perpetuated past discrimination, defendants would have to show that the policy was justified by business necessity.[11] Since none of these facts were found by the lower court, it was improper to consider this item as indicative of nondiscrimination.

4. The district court noted the recent dramatic improvement in black promotions to salaried supervisor. Between 1971 and 1974, eight of the twenty newly appointed foremen were black. This figure is clearly indicative of the lack of discrimination in promotion. It is appropirate to consider it as counterbalancing evidence of the statistics indicative of discrimination which were presented by the plaintiffs.

[30, 31] Since two of the four reasons given for finding that the plaintiffs' statistics did not establish a prima facie case of racially discriminatory promotion to supervisory positions were erroneously considered, the court's conclusion that no discrimination was proven is reversed. We do not conclude, however, that the evidence clearly makes out a prima facie case. Instead, we remand to the district court to balance recent promotion statistics and black turn-downs against the overall statistics presented by the plaintiffs.[12] The inference to be drawn from this balancing of the evidence is for the lower court. Should the court desire supplemental evidence in its reconsidering it may on remand open the record to evidence concerning promotions made since trial.

V. WORK WITHIN THE SAME JOB CLASS

[32] With but one exception the management of Pullman-Standard has the sole authority under the collective bargaining agreement to assign work among employees working within a given job class in a given department. The only exception is that members of the welding department are able to bid to their supervisors for "sub-assembly" work according to departmental seniority. Plaintiffs argue that the supervisors in exercising this unbridled discretion give the more desirable assignments to white employees and the less desirable ones to blacks. The lower court not only found that the plaintiffs had failed to prove that blacks were assigned to less desirable tasks within each job class, it also found that the plaintiffs were unable to prove which tasks were more or less desirable. The totality of the proof clearly showed that various employees had varying interpretations of which tasks within each job class were more or less desirable. Given nothing but this kind of subjective opinion evidence, especially since the credibility of each witness was at the core of the issue, we are unable to say that the lower court's factual conclusion was clearly erroneous.

VI. INDIVIDUAL CLAIMS

[33] The lower court concluded that Louis Swint and Clyde Humphrey were not discharged for racial reasons as alleged. Insubordination, the principal reason given for the discharge in each instance, was more than amply justified. The court's conclusion that there was not even the slightest evidence anywhere in the record upon which it could indulge the inference that these individuals were fired because they were black is not clearly erroneous.

VII. NOTICE OF APPEAL

[34] Pullman-Standard's attempt to limit the issues on appeal solely to these presented by Louis Swint in his individual capacity is without merit. *Jones* v. *Chaney & James Construction Co.*, 399 F.2d 84, 86 (5th Cir. 1968); *Markham* v. *Holt*, 369 F.2d 940, 943 (5th Cir. 1966); *see Foman* v. *Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225 (1962).

CONCLUSION

The judgment appealed from is vacated and the cause is remanded to the district court for such proceedings as that court may determine are appropriate or necessary to compliance with this opinion.

AFFIRMED IN PART, PART VACATED AND REMANDED.

Appendix B - Footnotes

[1] The factual statement was taken substantially verbatim from the opinion of the disrict court.

[2] Orders may be for as few as 25 cars or for several thousand.

[3] The number of workers in Steelworkers units at the Bessemer plant varies from over 2,800 at peak employment periods to less than 200 at the lowest levels. During 1973, which was not abnormal in this respect, on only three occasions was the employment level in one week approximately equal to that of the prior week. Indeed, a chart based upon monthly employment hours from early 1958 to mid-1974 reflects only a very few times that hours worked in one month have been approximately the same as in any of the two months preceding or following. Changes in the work force were occurring during the several weeks this case was tried.

[4] Millwrights and certain employees in the Die and Tool Department are represented by the International Association of Machinists and Aerospace Workers, AFL-CIO. For the limited purpose that some of the relief sought by plaintiffs might entail possible modification of its contract with Pullman-Standard, the I.A.M. and its Local Lodge 372 were joined as defendants named in any charges before the EEOC or involved in the allegations of the pleadings in this case.

[5] While the job classification manual lists some 250 jobs, many of these are not worked at Pullman-Standard, and several of the classifications—particularly, laborer, cleanup, craneman, and hook-on—appear in a number of departments as separate listings. The plaintiffs identified 123 jobs from the June 1973 seniority rosters, but even this figure includes duplications where the same job appears in more than one department.

[6] According to data showing the average number of persons drawing paychecks by department over an 18-month period ending June 1974, over 50% of the employees work in the Welding and Steel Erection Departments and almost 77% work in those departments plus the next four largest (Paint & Shipping Track, Punch & Shear, Steel Construction, and Maintenance).

[7] For example, Cleanup man, JC 1, has the lowest nonincentive standard hourly rate ($3,635 as of October 1973), while Template Maker Craft, JC 20, has the highest such wage ($5,399 as of October 1973). Piece-rate scales and production quotas are frequently of great significance in determining the actual earnings potential of a particular job.

[8] There are a score or so of female production and maintenance workers at Pullman, both white and black. Due to the predominance of male employees, however, the masculine gender for pronouns is used for convenience in this opinion.

[9] Actual work-hour figures for 1965 were not available; nor was the June 1, 1965 seniority list. However, by looking at the June 1964 seniority list and by taking account of the additions and deletions to that list representing hires and terminations during the year, the trial court constructed the functional equivalent of the June 1965 list. This calculation reflects 1,151 blacks and 1,773 whites on the seniority list as of June 1, 1965. While the seniority list does not absolutely reflect actual employment at any particular time, it does bear a significant correlation therewith in a period of high employment, such as June 1965 (in excess of 2,350 average workers for the month). It may be noted that the actual employment of blacks in the December 1972-June 1974 period, *i.e.*, 49.5%, exceeded slightly the percentage of blacks on the seniority lists for June 1972 and June 1973, *i. e.*, 44% and 46% respectively.

[10] That the percentage of black workers at Pullman-Standard is higher than the percentage of black population or work force in Jefferson County, or even in Bessemer, does not, however, indicate hiring bias in favor of blacks. While data has not been compiled to compare actual applications for employment with hiring at Pullman for the period, one can, by analyzing the seniority rosters from 1966 through 1973, determine that approximately 36% of the new hires during that period were black, a percentage which is compatible with work force and population data from the census. Presumably, the analysis of quits and discharges during 1971 showing that during that year almost three times as many whites as blacks either quit or were discharged, would be typical for the entire period. One may speculate that relative job opportunities with other employers were better for whites than for blacks and that relatively more blacks than whites chose to accept recall to Pullman after layoffs.

[11] For a number of years the labor agreement had contained language requiring its provisions to be applied without discrimination, but prior to the McCoy arbitration decision in March 1965 this language had been without apparent significance.

[12] A temporary promotion results in some increase in compensation and, perhaps more significantly, is the principal avenue by which an employee can obtain recognition as capable of satisfactorily performing the job.

[15] The memorandum contained provisions similar to those later incorporated in the 1972 agreement, including transfer rights with seniority carryover for black employees from four "low-ceiling" departments or to the five formerly all-white departments. (A black employee had already been assigned to one of the five "white only" departments, plant protection.)

[16] Over a hundred blacks have received welder training at company expense and become welders at Pullman (though many have since gone with other companies). Without denying the benefits such training has provided to blacks, plaintiffs do note that with respect to welder jobs, the company has instituted a requirement that before it will test a welder's competency the employee must now show either formal training or field experience with some other company.

[17] The union has never formally adopted the agreement, but in practice has accepted the terms thereof to the extent that it must be deemed bound thereby.

[18] Employees from the low-ceiling departments, if possessing minimal qualifications, can also obtain vacancies arising in the I.A.M. units. In such event, they take their plant age into such units for the purposes of layoff and recall and, when vying against other apprentices at the same level, for promotional purposes. Without formally concurring in the agreement, the I.A.M. has apparently accepted the provisions and implicitly agreed to be bound thereby.

[19] The class was defined as consisting of all black persons who at any time subsequent to 1 year prior to the filing of any charges with the EEOC had been employed by Pullman-Standard (at its Bessemer plant) as production or maintenance workers in positions represented by the United Steelworkers. General notification to class members specified these as the issues in the case and stated that the entitlement to back pay, if any, by any members of the class would be determined by subsequent hearings, but only if the class prevailed on one or more of the four issues.

[20] In the pretrial order this issue was defined as subsuming the contentions on behalf of the class that the agreement with the Department of Labor was inadequate in the following respects: the transfer rights applied only to four departments; the agreement did not provide for "red circling", *i. e.*, carrying an old wage rate into a new department upon transfer; only a single transfer was provided; and transfers to I.A.M. positions were not afforded. At conferences during the trial of

the case it became apparent that plainitffs also contended that the transfer rights should have been extended to black employees hired in the 1965-68 period, rather than being limited to pre-May 1965 employees.

[19] Mr. Swint's claims are premised on 42 U.S.C.A. §§ 1981, 2000e—2(a)(1), and 2000e—3(a), while Mr. Humphrey's is grounded only upon 42 U.S.C.A. § 1981.

[20] We recognize that the lower court concluded that discriminatory departmental assignment was present in the nine departments covered by the OFCC agreement (Template, Power, Inspection, Air Brake, Steel Miscellaneous, Plant Protection, Truck, Die & Tool, Janitor). The court, however, determined that the agreement, except for an adopted time extension, adequately eliminated the perpetuation of the discrimination which would otherwise be inherent in the departmental seniority system.

[21] The following chart, constructed by the lower court, reflects by department, ranked by job class ranges, the racial composition of the work force in June 1965, together with certain accumulating percentage figures.

The district court provided the following explanation of the chart:

> A ranking according to job class levels does not mean that each employee would so rank the departments in terms of desirability; but it does provide *a rough index of earnings potentials* in the absence of other more reliable data, such as average earnings or average job class worked. For the Welding department, the court has disregarded the highest job, Welder-Craft (JC 16), using instead the next highest job class, this adjustment being made because the highest position offers such few opportunities considering the size of the department, *i. e.*, less than 1% of the department jobs. This study is based upon seniority rosters in the absence of data showing actual distribution of the work force by departments . . . . [P]ercentage Column II disregards employees for the nine depatments involved in the agreement with the Department of Labor and percentage Column III further disregards the Maintenance and Welding departments. (Emphasis added).

DEPARTMENT	JOB CLASS RANGE	NUMBER OF EMPLOYEES		I		II		III	
		#B	#W	%B	%W	%B	%W	%B	%W
Template	2.20	0	9	0.	0.77	-	-	-	-
Maint.	4.18	26	98	2.26	9.12	2.54	8.98	-	-
Forge	1.17	12	20	3.30	10.06	3.71	10.81	-	-
Power.	6-16	0	4	3.30	11.17	-	-	1.43	6.35
Inspec.	12-13	0	28	3.30	13.55	-	-	-	-
Punch & S	1-13	120	28	13.73	15.94	15.41	13.38	15.75	15.24
Mob. Cr.	5-12	3	2	13.99	16.11	15.71	13.56	16.11	15.87
Press	1-12	48	17	18.16	17.56	20.39	15.12	21.84	21.27
Rail.	7-11	8	10	18.85	18.41	21.17	16.03	2.79	24.44
Air Brake	6-11	0	27	18.85	20.72	-	-	-	-
S. Const.	1-11	124	18	29.63	22.25	33.27	17.69	37.59	30.16
Paint. ST	1-11	91	84	37.53	29.41	42.15	25.39	48.45	56.83
S.Erec.	1-11	290	41	62.73	32.91	70.44	29.14	83.05	69.84
W.Erec.	1-11	65	35	68.37	35.89	76.78	32.35	90.81	80.95
W.Mill	1-11	7	17	68.98	37.34	77.46	33.91	91.65	86.35
Welding	1-10	161	678	82.97	95.14	93.17	96.05	-	-
Wheel & A	1-10	13	30	84.10	96.84	94.44	97.88	93.20	92.70
S.Misc.	2- 9	86	2	91.57	97.01	-	-	-	-
S. Stores	2- 9	45	10	95.48	97.87	98.83	98.80	98.57	95.87
P.Protec.	6- 8	0	12	95.48	98.89	-	-	-	-
L. Stores	3- 8	5	7	95.92	99.49	99.32	99.44	99.16	98.10
M. Stores	3- 8	7	6	96.52	100	100	100	100	100
Truck	1- 6	21	0	98.35	100	-	-	-	-
D & T	1- 5	9	0	99.13	100	-	-	-	-
Janitor	1	10	0	100	100	-	-	-	-
		1151	1173						

[33] Most courts use some kind of average salary comparison instead of wage range comparison. *See, e. g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, *cert. denied* (5th Cir. 1974), 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Even the lower court in an explanatory note to the chart recognized that a average hourly wage comparison would be preferable. The only two cases which have used wage range comparisons are distinguishable. In *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), the court used job class (not department) ranges—the court was examining discriminatory promotion and hiring, not perpetuation of discrimination caused by departmental seniority. In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va. 1968), discussed *infra*, the court ordered plantwide seniority even though blacks wre not assigned to departments with the least desirable wage ranges.

[34] The chart below ranks the departments in Column III of the district court's chart according to job class median. Departments having the same job class median are ranked, in descending order, according to size, Maintenance CIO and Welding are included while the Mobile Crane Department is not.

Median Job Classes of "Mixed" Departments
As of June 1, 1965

Department	Job Class Median	Median JC Blacks	% Blacks in Dept.	Accum. % B.	W.
Maint. CIO	13	4	21.0	2.5	8.9
Welding	10	6	19.2	18.3	70.6
Paint & ST	7	6	52.0	27.2	78.2
Railroad	7	7	44.4	28.0	79.1
Steel Erection	6	6	87.6	56.4	82.8
Steel Constr.	6	6	87.3	68.5	84.4
Wheel & Axle	6	6	30.2	69.8	87.1
Forge	6	2	37.5	71.0	88.9
Misc. Stores	6	7	53.8	71.7	89.4
Wood Mill	5	2	29.2	72.4	90.9
Punch & Shear	4	3	81.1	84.1	93.4
Wood Erection	4	2	65.0	90.5	96.6
Press	4	4	73.8	95.2	98.1
Lumber Stores	3	3	41.7	95.7	98.7
Steel Stores	2	2	81.8	100.1	99.6

[34] *See United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970) reversing a lower court's failure to consider evidence of black exclusion from a welding department, *albeit* for other reasons.

[35] *See, e. g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[36] The court did, however, recognize that there were no formal lines of progression designed to teach these skills.

[37] *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1177-78 (5th Cir. 1976); *cf. United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[38] *See, e. g., Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 726 (5th Cir. 1976); *United States* v. *T.I.M.E.—D.C., 517 F.2d 299 (5th Cir. 1975), cert. granted,* ___U.S.___, 96 S.kCt. 2200, 48 L.Ed.2d 814, (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rogers* v. *International Paper Co., 510 F.2d 1340 (8th Cir.), as modified*, 526 F.2d 722 (1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted,* ___ U.S. ___, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Herrera* v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974); *cert. denied,* ___ U.S. ___, 96 S.Ct. 2201, 48 L.Ed.2d 815 (1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 388 (1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1368 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Georgia Power*, 474 F.2d 906, 910 (5th Cir. 1973); *United States* v. *Cheaspeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 307 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert.*

dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245, 246 (10th Cir. 1970), *cert. denied,* 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); *United States* v. *Dillon Supply Co.,* 429 F.2d 800 (4th Cir. 1970).

[29] Although four departments were discussed in *Quarles,* only three departments were involved in the relief ordered.

[30]The conclusion which relied on *United States* v. *Hayes International Corp. (Hayes I),* 415 F.2d 1038 (5th Cir. 1969), was phrase: "equity may for the purposes of injunctive relief presume damages from the invasion of a legal right. . . ." *United States* v. *United States Steel,* 371 F.Supp. 1045, 1058 (N.D.Ala. 1973).

[31]. *E.g., Morrow* v. *Crisler,* 479 F.2d 960 (5th Cir.1973), *aff'd en banc,* 491 F.2d 1053 (1974); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970).

[32]. *See Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *cert. granted,* ____ *U.S.* ____, *96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).*

[33]. *See Ochoa* v.*Monsanto,* 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551 (9th Cir.) *cert. denied,* 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

[34]. *See United States* v. *United States Steel,* 520 F.2d 1043, 1053 (5th Cir. 1976).

[35]. This conclusion, however, should not be misconstrued as a holding that departmental desirability is irrelevant. In fact, departmental desirability could be relevant to the establishment of a prima facie case in two instances: First, as pointed out in *U.S. Steel,* if backpay is sought and if the defendants have convincingly brought into question the class's entitlement to it, economic harm must be shown. Second, a showing that the departments to which blacks have disproportionately been assigned are less desirable departments is probative of racial discrimination. Such a showing could in fact be crucial to the establishment of a prima facie case when the racially disparate assignments are not substantial in number or proportion.

[36]. The relevant inquiry has been variously defined: "pattern and practice," *Sagers* v. *Yellow Freight System, Inc.,* 529 F.2d 721, 729 (5th Cir. 1976); "broad patterns and practices, as opposed to individual damages," *United States* v. *United States Steel,* 520 F.2d 1043, 1049 (5th Cir. 1976); "pattern of past discriminatory hiring," *Sabala* v. *Western Gillette, Inc.,* 516 F.2d 1251, 1261 (5th Cir. 1975); "history of racial discrimination," *EEOC* v. *Detroit Edison,* 515 F.2d 301, 313 (6th Cir. 1975); "history of employment discrimination,"

Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974); "historical pattern," *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1025 (6th Cir. 1973); "policy of racial assignment," *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 875 (6th Cir. 1973); "pattern and practice of racial discrimination in hiring," *Morrow* v. *Crisler*, 479 F.2d 960, 962 (5th Cir. 1973), *aff'd en banc*, 491 F.2d 1053 (5th Cir.1974); "practices, policies or patterns," *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), *quoting United States* v. *Dillon Supply co.*, 429 F.2d 800, 804 (4th Cir. 1970); "plant-wide system-wide racially discriminatory employment practices," *Jenkins* v. *United Gas Co.*, 400 F.2d 28, 34 (5th Cir. 1968).

[37]. *See Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975). *Baxter* delineates two phases for the Title VII inquiry. Phase One is reserved for class-wide determinations and Phase Two for individual proof of damages for backpay purposes and the assertion of defenses as to individuals.

[38]. *See generally Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5thCir. 1976); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir.1975), *cert. granted*, ____ U.S. ____,96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[39].In *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375 (8th Cir. 1973), the reviewing court first established that a prima facie case had been shown and then proceeded to delineate the bounds of the affected class. *See also Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117-18 (5th Cir. 1975).

[40]. In rejecting the limitation of the scope of the court's examination to the statistical imbalance of nine departments, we likewise reject the notion that a Title VII prima facie case of discriminations could be shown merely by proving that some departments in a plant do not approximate the racial makeup of the plant.

[41]. *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747,96 S.Ct.1251, 47 L.Ed.2d 444 (1976); *Johnson* v. *Goodyear Tire & Rubber*, 491 F.2d 1364 (5th Cir.1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354,355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[42]. In evaluating the evidence presented in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir.1971), *cert denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), this court stated:

> Certainly the weight to be accorded this [discriminatory] inference varies: much depends on the correctness, completeness, and comprehensiveness of the figures proffered. Measured by these criteria, the Government's statistics *sub judice* should have been given substantial weight. They disclose that *all* persons hired for higher paying positions and *most* people promoted to these jobs after Title VII's effective date were white. Absent explanatory evidence and tesimony, the statistics indicate that officials have impliedly equated job qualifications with race.

[43]. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1970); *cf. United States* v. *T.I.M.E.- D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

[44]. The existence of an OFCC agreement does not provide the company with a defense to the Title VII action. *See Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1166 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *United Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir.1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[45].*See* notes 25 & 27 *supra.*

[46]. Title VII cases have often considered similar historical discrimination policies in evaluating the prima facie case aspect. *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1165 (5th Cir. 1965); *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 107 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678 (5th Cir.1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir.), *as modified*, 526 F.2d 722 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 221 (5th Cir.1975); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1369 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 355 (8th Cir. 1973); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Fran. Ry.*, 464 F.2d 301, 306 (8th Cir. 1972).

[47]. *See* note 46 *supra.*

[48]. In this highly volatile employment, workers were frequently laid off. Plaintiffs contend that the reason this gross pay comparison looked as good as it did was because blacks working at lower paying jobs with better seniority experienced fewer layoffs. Thus to receive comparable payments from Pullman-Standard, whites worked fewer hours and drew unemployment benefits while vacationing or working at jobs for others. The district court indicated this contention might have some probity by its finding that the desirability of majority black jobs was enhanced by stability and less frequent lay offs than higher paying majority white jobs.

[49]. This court has previously indicated in dicta that consideration should be given to including supervisory and clerical personnel, especially if they are heavily white, in such average yearly wage racial comparisons. *United States* v. *Hayes International Corp. (Hayes I)*, 415 F.2d 1038, 1040 n. 3 (5th Cir. 1974).

[50]. The use of statistics and similarly statistical wage comparisons must be conditional on the "absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn." *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971); *accord, Ochoa* v. *Monsanto Co.*, 473 F.2d 318, 319 (5th Cir. 1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[51]. For an example of this prima facie case approach, see *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). There, this court focused on the percentage variance from the plant's racial norm in each department, various tests and educational requirements which were hiring and transferring barriers, lower paying disproportionate black departments, and past official policies of segregation in the plant. The court found that the combination of all of these items made out a prima facie case of plant-wide discriminatory departmental assignment.

[52]. *E.g., Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721, 729 (5th Cir. 1976); *United States* v. *United States Steel*, 520 F.2d 1043 (5th Cir. 1975); *United States* v. *T.I.M.E.-D.C.*, 518 F.2d 299, 313 (5th Cir. 1975), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1255 (5th Cir. 1975); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 111-12 (5th Cir. 1975);*EEOC* v. *Detroit Edison*, 515 F.2d 301, 313 (6th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340

(8th Cir.), *as modified*, 526 F.2d 722 (1975); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372, 1376 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, 593 (4th Cir. 1972); *United States* v. *Bethlehem Steel Co.*, 446 F.2d 652, 660-61 (2d Cir. 1970); *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

[13] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1168 (5th Cir. 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1262 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974); *Bing* v. *Roadway Express, Inc. (Bing II)*, 485 F.2d 441 (5th Cir. 1973); *United States* v. *Georgia Power*, 474 F.2d 906 (5th Cir. 1973).

[14] The carry-over of antecedent seniority need not be granted to every employee; it is compelled only for victims of prior discrimination, dubbed by the courts to be members of the 'affected class.' Although the gravamen of an attack on the seniority forfeiture provision may be its inhibition of minority transfer, the affected class clearly includes those who already have transferred, incurring the loss, as well as those inhibited from transfer. On the other hand, the affected class is not necessarily that described by plaintiffs in the class action paragraph of their complaint nor does it extend to those hired after discrimination has ceased.

Stacy, Title VII Seniority Remedies in a Time of Economic Downtown, 28 Vand.L.Rev. 487, 496-97 (1975).

[15] *See, e.g.*, *Rodriquez* v. *East Texas Motor Freight*, 505 F.2d 50 (5th Cir. 1974), *cert. granted*, ___ U.S. ___, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974).

[16] *See, e.g.*, *EEOC* v. *Detroit Edison*, 515 F.2d 301, 316 (6th Cir. 1975); *United Papermakers, Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

[37] "Though this rule seems simple, it has been misapplied to foreclose class membership to blacks hired after the assignment of just one white to a previously all-black department. *E.g.*, *Johnson* v. *Goodyear Tire & Rubber Co.*, 349 F.Supp. 3, 16 (S.D.Tex.1972), *modified*, 491 F.2d 1364, 1374 (5th Cir. 1974)." Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 24 Vand.L.Rev. 487, 497 n. 73 (1975). *See Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374 (5th Cir. 1974).

[38] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1174 (5th Cir. 1976); *citing Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112 (5th Cir. 1975) *and Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 248 n. 99 (5th Cir. 1974); *accord*, *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1355-56 *as modified*, 526 F.2d 722 (8th Cir. 1975); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375-76 (8th Cir. 1973; *Long* v. *Georgia Kraft Co.*, 450 F.2d 557, 560 (5th Cir. 1971); *United States* v. *Bethlehem Steel*, 446 F.2d 652, 659 (2d Cir. 1970).

[39] *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112 (5th Cir. 1975):

> We do not hold as a matter of law that there should always be . . . red circling . . . . The requirement for and feasibility of the remedy turn on factual matters.

[40] If the district judge chooses to credit all testimony, the present record indicates that some discriminatees might initially suffer reduced wages by transferring to another department. Whether this reduced wage phenomenon would be the result of a departmental reduction in force is not clear from the record. We intimate no view as to the proper resolution of this issue.

[41] The following are the other reasons given by the district court: (1) There are no lines of promotion or residence requirements to impede promotion in new departments. (2) Frequent manpower fluctuations may create new opportunities. (3) Some of these manpower fluctuations will obviate old wage rates. (4) No training is provided for new jobs.

[42] By company consent an after-the-fact notification process has begun.

[45] Word of mouth notification systems, at least for purposes of publicizing job vacancies, have been alluded to as being inherently prejudicial to blacks in majority white plants. *E.g.*, *United States* v. *Georgia Power*, 474 F.2d 906, 925 (5th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

[46] *Cf. Stevenson* v. *International Paper Co.*, 516 F.2d 103, 112-113 (5th Cir. 1975); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1174 (5th Cir. 1976).

> This reconsideration should not be limited to only considering the word of mouth notification system. It should also consider the recently instituted system of posting daily turn-over sheets, monitoring provided by union members, and notification provided by contract compliance officers. If any such system is to be instituted, the business necessity defense which was not reached by the court before, should be considered.

[47] In a footnote to its opinion the district court held one subclass was not entitled to backpay.

[48] *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374 (5th Cir. 1974); *accord, Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 712-20 (7th Cir. 1969).

[49] "Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976).

[50] *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975); *Sabala* v. *Western Gillette Inc.*, 516 F.2d 1251, 1264 (5th Cir. 1975); *Gamble* v. *Birmingham So. R.R.*, 514 F.2d 678, 686 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1378 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 388 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 251-53 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Sims* v. *Sheet Metal Workers Local 65*, 489 F.2d 1023, 1028 (6th Cir.

1973); *United States* v. *Georgia Power*, 474 F.2d 906, 921 (5th Cir. 1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (5th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

[10] *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

[11] Plaintiffs claim that some whites promoted to foremen had less formal education than some blacks who were not promoted.

[12] *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 117 (5th Cir. 1975); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1344, *as modified*, 526 F.2d 722 (8th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 59 (5th Cir. 1974), *cert. granted*, ____ U.S. ____, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 249 (5th Cir. 1974); *Rowe* v. *General Motors*, 457 F.2d 348, 358 (5th Cir. 1972).

[13] We note in this regard that the use of subjective promotion criteria by mostly white foremen has been held to be a ready mechanism for racial discrimination in promotion. *Rowe* v. *General Motors*, 457 F.2d 348, 358-59 (5th Cir. 1972); *accord*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1192-93 (5th Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 241 (5th Cir. 1974); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 367-68 (8th Cir. 1973).

APPENDIX C

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, a Division of Pullman, Inc., et al., No. CA 71-P-0995-S, July 5, 1977

CIVIL RIGHTS ACT OF 1964

1. Seniority — Departmental seniority system ► 108.3315

Employer's departmental seniority system, which was adopted and has been maintained free of racial purposes, which is neutral in form and consistent with industry practice, and which has been uniformly followed for all employees regardless of race, is valid under Section 703(h) of Civil Rights Act of 1964, even though seniority system perpetuates effects of employer's pre-Act racially discriminatory assignment policy.

2. Racial discrimination — Job assignments ► 108.3115

Employer that discriminated on basis of race in assigning jobs before enactment of Title VII did not violate Act by its assignment policy after 1966, despite variations for each of years 1967 through 1973 in racial composition of its departments beyond that expected from random, "colorblind" selection, since (1) racial make-up of departments was attributable to pre-Act discrimination, (2) employer's post-1966 assignments indicate that it was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white departments, and (3) finding of pre-Act discriminatory assignments does not compel circumstantially a finding that such assignments were made during time period involved in present action.

3. Racial discrimination — Selection of supervisors — Bona fide occupational qualification ► 108.3178

Employer's requirement that salaried supervisors be selected from employees who served satisfactorily as temporary foremen, which requirement existed both before and after blacks became appointed as temporary foremen, is bona fide occupational qualification, and employer did not violate Title VII by its appointments to supervisory positions, where number of blacks appointed to such positions is less than two standard deviations from number expected from composition of temporary foremen for relevant period, and employer made earnest efforts to promote blacks into supervisory level.

4. Racial discrimination — Promotion ► 108.3178

Employer did not discriminate against black employees in its selection of employees for position of temporary foreman, even though each selection was limited to employees working in department in which temporary foreman position occurred, where difference between percent of total offers actually made to black employees and percent of offers that would be expected in absence of discrimination is less than two standard deviations.

5. Racial discrimination — Promotion ► 108.3178

Employer that selected only employees in welding department with adequate skills and experience for position of temporary foreman did not discriminate against blacks, despite "under-appointment" of 11 blacks to that position, since a large number of promotions were made at time when black welders had only a few months of experience and did not possess skills needed to act as foreman despite employer's active efforts to seek out and train blacks to be welders.

6. Racial discrimination — Experience requirement ► 108.3045

Employer did not discriminate against blacks by its requirement that employees seeking to become welders demonstrate either training or outside experience, where this valid requirement, which was not put in until black employees were given opportunity to demonstrate their skills as welders, was intended to prevent on-the-job training of unqualified white employees.

On remand from the U.S. Court of Appeals for the Fifth Circuit (13 FEP Cases 604, 539 F.2d 77). Judgment for employer and union.

See also 11 FEP Cases 943.

U. W. Clemon (Adams, Baker & Clemon), Birmingham, Ala., for plaintiffs.

C. V. Stelzenmuller and D. Frank Davis (Thomas, Taliaferro, Forman, Burr & Murray), Birmingham, Ala., for defendant employer.

John C. Falkenberry (Cooper, Mitch & Crawford), Birmingham, Ala., for union defendants.

Full Text of Opinion

SAM C. POINTER, Jr., District Judge: — On September 13, 1974, this court denied the plaintiffs' several claims of racial discrimination. 8 EDP ¶9720, 11 FEP Cases 943. On August 30, 1976, the Fifth Circuit remanded the case for further proceedings with respect to two issues — the seniority system and the selection of supervisors. 539 F.2d 77, 13 FEP Cases 604.[1] On February 22-23, 1977, after conferences and further pretrial briefing, additional evidence was taken and the case resubmit-

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[1]All footnotes for this section appear at the end of this Appendix, pp. A-119-A-123.

ted. Final decision was delayed in anticipation of potentially relevant Supreme Court cases, which, as it turned out, are indeed of critical significance in the case sub judice.[2] See International Brotherhood of Teamsters v. U.S., — U.S. — , 45 LW 4506, 14 FEP Cases 1514 (May 13, 1977); United Air Lines, Inc. v. Evans, — U.S. — , 45 LW 4566, 14 FEP Cases 1510 (May 31, 1977).

I. Seniority System

This court had found Pullman's departmental seniority system not to be in violation of Title VII, basing its decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments.[3] The Fifth Circuit directed that this finding be reconsidered, emphasizing that past discrimination in assignments could be established, at least as a part of plaintiffs' *prima facie* case, without regard to the relative desirability of those departments — i.e., that in employment situations, as with schools, there is no "separate but equal" doctrine. The Circuit also reviewed in depth the procedures to be followed under existing precedents should, on such reconsideration, the trial court determine that a *prima facie* case of discriminatory assignments was shown.

In the initial trial court decision and on the appellate review, principal attention was focused upon the extent, if any, to which there had been shown discrimination in departmental assignments prior to June 1965. It was sufficient to look to such a time period because it provided the evidence most favorable to plaintiffs' claims of discriminatory assignments and because, under the then state of the law, a violation of Title VII was considered proved by showing a seniority system which perpetuated the effects of discriminatory assignments which pre-dated Title VII.

The Supreme Court decisions in the Teamsters and United Air Lines cases require, however, this court to place primary[4] attention upon a later period of time — starting ninety days before the filing of the first EEOC charge reasonably related thereto. These cases, in conjunction with the Franks case, teach that a "valid" seniority system does not violate Title VII even if it perpetuates the effects of past discrimination, although such a system may have to yield, subject to considerations of equity, to remedial measures ordered for persons injured by discriminatory acts timely challenged and pursued under Title VII. Looking to the earliest related EEOC charge,[5] what this means is that the court must, if it determines that the seniority system was "valid", also determine whether and to what extent there were discriminatory assignments to departments on and after December 27, 1966.[6] Evidence of discriminatory assignments prior to June 1965 or, indeed, prior to 1967, no longer forms the basis for the plaintiffs' claims, but is now useful only for its circumstantial value.

[INITIAL INQUIRY]

[1] An initial inquiry is whether the seniority system at Pullman is "valid" — a word chosen by this court to encompass the several requirements imposed by statute and viable judicial precedents. As was implicit in its original opinion but is now made explicit, the court finds — subject only to the implications of the 1972 changes — that the seniority system was adopted[7] and has been maintained[8] free of any racial purposes; that it is neutral in form, applying equally to all; that it is consistent with industry practice and, particularly for a company with the operational characteristics of Pullman, quite rational; and that it has been uniformly followed for all, regardless of race.[9]

The one qualification to the foregoing stems from the 1972 changes to the seniority rules under the Department of Labor agreement. For the purpose of correcting possible past

discrimination, blacks hired before June 1965 were given special seniority benefits, detailed in this court's original opinion. To the extent of those changes, Pullman has seniority rules which are purposefully discriminatory — in favor of affected blacks — and which are not neutral at all. In the context of this case, the court finds it unnecessary to wrestle with the "reverse discrimination" problem raised thereby.[10] Suffice it to say, that the court finds that the seniority system does not discriminate against blacks and, at least on an attack made by blacks, is "valid" under 42 U.S.C.A. § 2000e-2(h).

[2] For the plaintiffs to prevail on this issue, therefore, they must establish that there were discriminatory departmental assignments after December 27, 1966. One method of proof, approved in the Teamsters case, is by comparing the racial composition of departments with each other and with applicable census information.[11] And, in the present case, exhibits PX 24-30 certainly do reflect that for each of the years 1967 through 1973 there were variations in the racial composition of the departments beyond that expected from random, "colorblind", selection. However, the law recognizes the reality of the situation; namely, that departments are not reshuffled anew each year but are rather, the result of past assignments as well as new ones.[12] Hence, as noted in Teamsters, an employer can overcome the *prima facie* effect of such statistics by showing that "the claimed discriminatory pattern is a product of pre-Act [assignments] rather than unlawful post-Act discrimination." 45 LW at 4515, 14 FEP Cases at 1529. Here, the evidence shows that the somewhat disparate compositions of the departments in the post-1966 period were attributable to the assignments made prior to Title VII, as covered in great detail in this court's prior opinion and in the Fifth Circuit's decision. Indeed, these very exhibits reflect that the extent of departmental variations from the overall work force composition was being reduced each succeeding year during the critical time period.

[ASSIGNMENT POLICIES]

It is, moreover, possible under the evidence in the case to directly examine the assignment policies of Pullman during the critical years, for one can derive from the records introduced the individual assignments that were made, and there is much information about how these decisions were made. While not reproduced here, the court has made a chart showing, for each year starting June 1966, the number of individuals, by race, assigned to each of the 28 departments. These statistics give rise to no inference that assignments were being made to further a policy of segregated or racially-imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white ones. The evidence reflects, moreover, no specific instances of discriminatory assignments during the post-1966 period and, to the contrary, a policy of actively attempting to get blacks into the formerly all-white jobs, which by and large were the "better" jobs. In Teamsters, the statistical data gave rise to an inference of discrimination, a conclusion "bolstered" by evidence of specific employment practices; here, the statistics for the period in issue give rise to the contrary inference, a conclusion abundantly supported by the other evidence in the case.

To what extent was there a policy of discriminatory departmental assignments in earlier years? An answer to this question would have been critical to the plaintiffs' claims prior to the recent Supreme Court decisions, and still may be of circumstantial value. The court has carefully reevaluated the evidence in the light of the principles indicated by the Fifth Circuit and does indeed find that there was, prior to March 1965, a policy of discrimination in such assignments which affected not just the nine departments dealt with in the Department of Labor agree-

ment, but indeed, in varying degrees, virtually every department — to the extent that it must be viewed as a plant-wide policy. This conclusion is based not so much on the statistical data, which, as recognized by the Fifth Circuit, is certainly susceptible of different interpretations, as it is upon the implications of the former practice of informally "segregating" most of the jobs at Pullman. The segregation of jobs prior to March 1965 — which certainly must be taken as an employment practice and policy, whether or not ever formally approved by company and union — meant that departmental assignments were likewise dependent upon the nature of the jobs where vacancies existed. If all the jobs of a department were "consigned" to employees of the same race, the department was, of course, totally segregated and departmental assignments were likewise racially determined. But even in mixed departments whose racial composition approximated that of the plant as a whole, the assignments were dependent upon whether particular job openings were for a white or black position, rather than a "mixed" one. What the court is saying is that there was a plant-wide policy of making assignments to departments based on race — not as a policy to segregate departments, but as a means to carry out the plant-wide practice of job segregation.[13]

[ARBITRATION DECISION]

The practice of job segregation was however upset by an arbitration decision in March 1965 dealing with Rivet Drivers, and over a period of the next several months, prompted in part by the advent of Title VII, it was discarded throughout the plant. Of course, it took some time before the residue of that former practice had essentially been eradicated.[14] The point is that, with the demise of the segregated job practice, so also went the ancillary practice of making departmental assignments based on race. Accordingly, the finding of pre-Act discriminatory assignments does not compel circumstantially a finding that such assignments were made during the period involved in this

lawsuit. It is clear that by December 1966 the company was no longer making assignments to departments based on race — except, that is, to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices — and that the plaintiffs have therefore failed to establish an essential element of their claim.

In its original decision this court had concluded that the company did not immediately abandon its discriminatory assignment policies respecting six of the nine departments involved in the OFCC agreement. The court instead used as a cutoff — for purposes of determining which black employees should have the benefits under that agreement — the dates on which the first white achieved some permanent status in a formerly all-black department or on which the first black obtained such status in a formerly all-white department. Having been directed to reconsider this entire question, the court concludes that its original decision, based largely upon a mechanical application of statistical data respecting a few departments, was incorrect. It concludes, consistent with the remainder of this opinion and upon a reevaluation of the evidence in its totality, that there was not a policy of discriminatory assignments respecting these six departments after 1966 anymore than there was respecting the other departments.

It is perhaps useful to look at the assignments after December 1966 to these six formerly one-race departments. Respecting the three formerly all-white departments: in the Air Brake Department, while the next vacancy (in 1970) was filled by a white, blacks had been tried in the department in 1965 and in 1966, and in 1971 two blacks were assigned to it; in the Inspection Department, while three whites were assigned to it in the 1967-70 period, a black had been tried there in 1967 and two blacks had declined assignment to it in 1969, and indeed six of the 10 inspectors with post-April 1965 seniority dates are black; and in the Plant Protection Department the first vacancy filled after

December 1966 was by a black. Insofar as the formerly all-black departments are concerned, the first vacancy in the Janitor Department after December 1966 was filled by a white; the second vacancy in the Die and Tool Department after that date was filled by a white (and post-Act assignments to the department have more frequently been of whites than of blacks); and in the Truck Department two of the first five vacancies were filled by whites and through the date of trial more whites than blacks were hired into that department. In the other three departments covered by the OFCC agreement, the first vacancies occurring after April 1965 were filled by workers of a race different from the prevailing racial identiy of those departments, dramatizing the change of policy that had taken place.

[IAM DEPARTMENTS]

Special concern was raised in the Fifth Circuit decision as the situation respecting the two formerly all-white IAM departments, a matter which had not been covered in detail in the original decision. The first post-1966 assignments to the Machinist Department (IAM) were three blacks and four whites. The Die & Tool Department (IAM), six blacks and one white were assigned in 1966 and over the next four years seven other blacks and eight whites were assigned to it. The court is convinced that with respect to these departments, as with the other twenty-six departments, there was no policy or practice of discriminatory assignments after December 1966.

Having found that during the applicable time period there was no policy or practice of discriminatory department assignments to any of Pullman's departments, the court is not called upon to treat the relief-oriented issues described by the Fifth Circuit, such as "red circling" and "posting". The court furthermore vacates that part of its earlier decision which had expanded the rights given blacks under the OFCC agreement and which had provided a means for certain blacks to present

back pay claims respecting the effect of the department seniority system upon their prior assignments. It will not therefore be necessary for the court to determine, under teamsters, whether claimants for back pay who did not request assignment or transfer to particular departments would have done so but for knowledge of some contrary company policy — a matter which would be most difficult of proof under the facts of this case showing active efforts by the company to correct past imbalances.

II. Selection of Superivsors

This court had found that plaintiffs failed to make a *prima facie* showing of discrimination in the selecion of supervisors, basing its ruling in part upon two factors which the Fifth Circuit concluded were impermissible under the circumstances.[13] The evidence from the original trial is now due to be reconsidered in conjunction with the additional evidence presented after remand.

At the time of trial only some 10% of Pullman's salaried foremen were black, a figure which is substantially below that expected from the labor market — which ranges from 25 to 35% black, depending on the age group and area selected — or from Pullman's own work force — which ranges from approximately 45 to almost 50% black, depending upon the time selected. As Teamsters indicates, however, such statistics may be the result of the pre-Act discrimination and hence may be "rebutted" by data pertinent to the employment decisions made during the period covered under the EEOC charge. A summary of these promotions is given below:

Years	Promotions	Blacks
1967-68	17	2 (12%)
1969-70	18	4 (22%)
1971-72	8	2 (25%)
1973-mid '74	20	6 (30%)
mid '74-Jan. 77	12	4 (33%)
	75	18 (24%)

While these figures would compare favorably to expectations from the area labor market, at least after the first few years, such a comparison would be inappropriate. Likewise, a comparison with Pullman's total work force — showing a substantial disparity — would also be inappropriate. As Hazelwood School District v. United States, —— U.S. ——, 45 LW 4882, 15 FEP Cases 10 (June 27, 1977), makes clear, the group selected for comparison should be one which, when special qualifications are needed to fill particular jobs, possesses those qualifications.

[LIMITATION]

[3] It is clear from the evidence, if not from common sense, that special skills are needed by supervisors and that — to paraphrase another Supreme Court decision[14] — all workers are not "fungible" when it comes to selection of supervisors. The long-standing practice at Pullman has been to select salaried supervisors from the ranks of those who have demonstrated their abilities as front-line supervisors, i.e., as temporary foremen. This limitation, imposed by Pullman both before and after blacks became appointed as temporary foremen, is found by the court to be a bona fide occupational qualification under the evidence in this case. It moreover provides — subject to consideration of whether promotions to temporary foremen have

temporary foremen themselves been discriminatory against blacks — the appropriate group to which comparisons should be made under Hazelwood School District.

The opinion in Hazelwood School District, fn. 17, suggests the usefulness of the standard deviation as a measure of predicted fluctuations, citing the methodology employed in Castaneda v. Partida, —— U.S. ——, 45 LW 4302, 4306, n. 17. (March 23, 1977). When such a caiculation is here made, it is found that the number of blacks appointed to salaried supervisory positions is less than two standard deviations from the number expected from the composition of temporary foremen for the period. Indeed for the latter eight years, the number of blacks so promoted is higher — though not statistically significant at $p < .05$ — than what was expected from the selection group. Certainly when taken in conjunction with evidence of a non-statistical nature as to the company's active and earnest efforts to promote blacks into the supervisory level — which are not mere "simple protestations" of a denial of discrimination" — it is clear, and the court so finds, that plaintiffs; *prima facie* showing with respect to salaried supervisors has been rebutted and that Pullman did not discriminate against blacks in such promotions in the time frame covered by the EEOC charges.

What about the promotions to temporary foreman, the practice by which Pullman has long met its sporadic needs for front-line supervision? The summaries presented by the company, DX-351 and DX-361, reflect that for the four most recent years the percentage of such promotions made to blacks has been some 31%. Here again, it is necessary to determine the group — or groups — to which the ratio of black promotions should be compared.

As was true with salaried foremen, it would be inappropriate to make a comparison to figures for the area labor market, a comparison which would give rise to no inference of racial

discrimination. And at first glance it would seem that a comparison could properly be made to the total work force at Pullman, which is 45-50% black. But that too, on analysis, would be inappropriate.

Promotions of temporary foremen are departmental in all essential aspects. They are made according to the needs of the individual departments. They are made by the supervisory personnel in that department. They are made from the employees working in that department.[18] The only involvement in the process by non-departmental personnel is the regular review by the Contract Compliance Officers — one black and one white — to assure that racial discrimination has not occurred.

[DEPARTMENTAL ANALYSIS]

The restriction of such temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity, under the evidence in this case. It is most appropriate in this case to analyze the temporary promotions on a departmental basis and to base expectancies on the composition of workers within the department. From the evidence in this case, principally DX-282 and DX-334[19], it is possible, as the court has done, to tabulate the departmental promotions, the blacks actually appointed, and the number of expected black appointments.

Promotions to Temporary Foreman
1967 through May 1974

Department	Promotions	Blacks	
		(exp.)	observed
Air Brake Pipe	3	(0)	0
Boiler House	0	(0)	0
Die and Tool, IAM	33	(1)	0
Die and Tool, CIO	0	(0)	0
Forge	6	(2)	1
Inspection	5	(0)	0
Janitors	0	(0)	0
Lumber Stores	0	(0)	0
Maintenance, IAM	17	(2)	0
Maintenance, CIO	47	(9)	13
Misc. Stores	12	(6)	5
Mobile Crane	0	(0)	0
Paint and Shipping	27	(14)	16
Plant Protection	0	(0)	0
Power House	0	(0)	0
Press	2	(1)	0
Punch and Shear	8	(6)	3
Railroad	6	(2)	1
Steel Construction	12	(9)	11
Steel Erection	57	(41)	41
Steel Misc.	36	(32)	29
Steel Stores	27	(20)	15
Template	3	(0)	0
Truck	0	(0)	0
Welding	149	(22)	11
Wheel and Axle	4	(1)	0
Wood Erection	12	(7)	3
Wood Mill	0	(0)	0
	466	(175)	149

The calculation of the expected number of black promotions was done by multiplying the number of such promotions in a department during a given month (or quarter) by the percentage of blacks working in the department that month (or quarter), then adding the products so obtained over the 89 month period, and then rounding the sum to a whole number. As to the two largest departments — Welding and Steel Erection — the black percentage was determined in a slightly different manner: in the Welding Department, the figures were the black percentage of welders that month (or quarter); and in the Steel Erection Department, the figures were the percentage of blacks working that month (or quarter) who were qualified as either Riveters, Assemblers, or Heaters. This limitation was thought appropriate because it is clear—and the court so finds—that only Welders would be qualified to act as temporary foremen in the Welding Department and only persons with experience as a Riveter. Assembler or Heater would be qualified to act as temporary foremen in the Steel Erection Department.

Similar restrictions as to prerequisite jobs needed for promotion to temporary foreman could be determined for many of the other departments. For example, it is clear that only a full Millwright has the necessary qualifications to be temporary foreman in the Maintenance (IAM) Department: and, if such a restriction had been utilized, the chart would have reflected no expected black promotions (rather than the two shown). The court's study of the departments, while not attempting to fix the actual number, does indicate that the expected number of black promotions shown on the chart is overstated and is closer to the actual number of black promotions.

[REJECTIONS]

[4] As was noted in the earlier decision, a greater number of blacks than whites have turned down offers of such promotions. The data on these refusals available to the court — for the

1971-73 period — can be used to make rough projections for the entire period.[20] The indications, is that, for every 30 whites who accepted, 32 would have been offered the promotion and that, for every 30 blacks who accepted, 36 would have been offered the promotion. When a chart such as that shown above is constructed using the projected number of offers of promotion, it shows that some 35% of the total offers would presumably have been made to blacks, in comparison to the expected figure of 38% — a difference of less than two standard deviations.

The greatest difference between observed and expected results shown on the chart — both in absolute numbers and standard deviations — is in the Welding Department, where there is an "under-appointment" of 11 blacks, or some 2.54 standard deviations from the expected result. And, indeed, exclusive of the figures for the Welding Department, the overall actual appointments of blacks (and not merely the projected job offers, as described in the preceding paragraph) would be less than two standard deviations from the expected number. Inquiry must certainly be made whether as to the Welding Department case of "liability" has been established respecting such promotions — i.e., such as would create a presumption of discrimination in favor of individual class members in the department, subject to additional proof as a "second" phase of the case.

[5-6] A major reason for the large disparity in promotions in the Welding Department is that during the first two years of the period involved — 1967 and 1968 — there were 24 such promotions and not a single black was selected. The problem was that the black welders had only a few months of experience as welders and did not possess the skills needed to act as foremen in the Welding Department. Nor was this the result of any post-Act discrimination against them — rather, as indicated in the prior decision, the company has during the applicable time period actively sought and trained blacks to be welders and — to prevent employment of unqualified welders, black or white — has adopted procedures to verify qualificatilns.[21]

[REBUTTAL BY EMPLOYER]

The restriction of temporary foremen in the Welding Department to those with adequate skills and experience — and who were willing to accept such appointments[22] — was a bona fide occupational requirement for such promotions and was shown to be justified by business necessity. As Teamsters makes clear, a company is not limited in the "liability" phase of a case merely to statistical evidence. See 45 LW at 4515, n. 46, 14 FEP Cases at 1529. Here the company not only has countered the plaintiffs' *prima facie* showing with other statistical evidence, undercutting inferences drawn from plaintiffs' statistics, but perhaps even more importantly has provided non-statistical information as to its promotion of black welders to temporary foreman positions, both as to its general policies and as to individual decisions. The active efforts to upgrade blacks in the Welding Department, both to welder positions and to temporary foreman, together with the regular reviews undertaken by the Contract Compliance Officers to assure lack of discrimination and to encourage black promotions, are not mere window-dressing. When both the statistical data, fairly evaluated, and the non-statistical evidence are fairly considered, the court is convinced, and so finds, that the plaintiffs' *prima facie* showing of discrimination in promotion of temporary foremen in the Welding Department has been rebutted and that no such discriminatory practice existed subsequent to 1966. The same finding is made with respect to promotion of temporary foreman in the other departments.[23]

III. Summary

The court finds and concludes that the company did not in violation of the anti-discrimination laws follow any practice or policy after 1966 which discriminated against blacks in the assignment of employees to departments or in the selection of supervisory personnel. Nor has any violation of such laws been

shown to have been committed by the unions. Judgment is due to be entered in favor of the defendants as to all issues in this case.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

Appendix C - Footnotes

[1] The Appellate court affirmed this court's rulings (a) that there had not been shown discrimination in the assignment of work among employees working the same job class; (b) that the failure to post job vacancies had neither discriminated nor perpetuated the effects of past discrimination; and (c) that the individual claims of discrimination by the plaintiffs had not been established. While the Fifth Circuit affirmed the ruling respecting "posting", it however held that the court should reconsider the question in the light of whether such relief was required to make efficacious the transfer rights of any who had been discriminated against.

[2] A third decision announced by the Supreme Court on the same day should also be noted. The body of the opinion in East Texas Motor Freight System, Inc. v. Rodriguez, — U.S. —, 45 LW 4524, 14 FEP Cases 1505, indicates that the instant case should not have proceeded as a class action at all. However, this case was certified before trial as a class action, was tried as a class action, and involved representative plaintiffs who had not at the time lost their individual claims. As footnote 12 of the Rodriguez opinion suggests, such facts make this case distinguishable from that in Rodriguez. Also see Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 12 FEP Cases 549, 551-553 (1976).

[3] While finding that there had been past discrimination in assignments to nine departments, the trial court concluded that, in view of transfer opportunities given blacks in 1972, the effects thereof were not being perpetuated by the seniority system.

[4] Evidenced as the practices prior to the effective date of Title VII or not the subject of timely EEOC charges would, of course, still be relevant *circumstantially* as to the practices challenged by timely EEOC charges.

[5] So far as the court has been able to determine from the evidence, the first EEOC charge against Pullman was one filed by a Commissioner in January, 1967. This charge, however, was limited to the alleged practice of segregated facilities and, even with liberal rules of interpretation, could hardly be held reasonably related to attacks on departmental or job assignments or on the seniority system. The next charge, also by a Commissioner, was filed on March 27, 1967, and, by questioning the hiring and promotion practices of Pullman, is susceptible to the interpretation that it related also to assignment and transfer matters. Actually it is doubtful that this Commissioner's charge should be used as a date-designator since the instant private

lawsuit grew out of later filed individual charges. The earliest charge filed by one of the plaintiffs, on October 15, 1969, did not raise challenges to the assignment, transfer, or seniority policies, although it was amended on several occasions prior to the issuance of the right-to-sue letter. The first private charge directly bringing into question the company's assignment policies was apparently filed on May 11, 1970. To give plaintiffs' the benefit of the doubt, the court has in this opinion used the earliest possible date, i.e., 90 days before the March 27, 1967, Commissioner's charge, while nevertheless having substantial reservations that such a date is proper.

[6] Read literally, the issue specified in the pretrial order — whether the seniority system perpetuates the effects of past discriminatory departmental assignments — would not under the recent Supreme Court decisions state a material issue under Title VII. However since this implicitly assumed as an issue whether there had been discriminatory assignments, it adequately indicated the issue which this court must now resolve and, indeed, abundant evidence was presented at the trial as to the employment practices of the company up to the time of trial itself.

[7] Discrimination against blacks, a reality for many years at Pullman prior to Title VII, was accomplished through the vehicle of reserving many of the "better" jobs for whites. The departmental seniority system was not adopted with the intent or purpose of protecting whites against blacks.

[8] Illustrative of this conclusion is the fact that on a relatively recent vote by the union — approximately half of whose members are black — opposition to a merger of several departments for seniority purposes was unanimous.

[9] Of course there have been the typical disputes processed through the grievance procedures claiming that the company deviated from the seniority rules. As noted in the original opinion, fn. 24, the plaintiffs have not actively contended that the rules have been discriminatorily applied.

[10] The problem is compounded by the fact that the 1972 changes give remedial relief to blacks whose mistreatment, pre-dating Title VII, was not a legal wrong.

[11] Unlike Teamsters, the present case does not involve any claim of discrimination in the initial hiring decisions, and for good reason. See 539 F.2d at 83, n. 10, 13 FEP Cases at 608. Reference to census data is of doubtful value to the case at hand.

[13] Also see 539 F.2d at 94, n. 40, 13 FEP Cases at 618 (*prima facie* case not established merely by proving some departments do not approximate racial makeup of plant).

[14] In so ruling, the court is not however saying that racial considerations were the sole determinant of assignments. The court rather is impressed, particularly in view of the evidence presented by the company after remand, that bona fide job qualifications played the decisive role in assignments to many of the key jobs and departments — that, for example, whites were assigned as welders and to craft jobs because, with only very rare exception, no black hires possessed the requisite experience and skills for those jobs. There were, however, a few such exceptions, where aparently qualified blacks were denied assignment for what the court must conclude was in furtherance of the job-segregation practice — and, though few in number, such persons should have the benefit of a presumption of liability *if* they had cognizable claims (which they do not, under Teamsters) under Title VII. The co-existence of a non-discriminatory reason for the majority of assignments (the lack of qualifications) would not, in short, have destroyed the plaintiff's *prima facie* showing on behalf of the class, but would rather have constituted defensive matter to be shown in responding to individual class members' claims at subsequent hearings.

[15] See the section entitled "Segregation Claims" in the initial decision, 8 EDP at p. 5989, 11 FEP Cases at pp. 951-952. It is here appropriate to respond to the Fifth Circuit's comment that, in dealing with the lag time involved for blacks to exercise the rights afforded by opening jobs to them, the district court had "inexplicably discussed completely different figures from those shown in the record." See 539 F.2d at 96. 13 FEP Cases at 620. This court had, in its footnote 31, stated that "the 1973 study by plaintiffs showed that 19.9% of the whites held positions on the roster above JC 10, as compared with only 12.2% of the blacks." and the Fifth Circuit in its opinion said, "plaintiffs' exhibits show that in 1973 74.1% of blacks still remained assigned to job classes lower than 8 while 80.7% of all whites were assigned to job classes over 10." This court did make an error of addition from PX-55, erroneously calculating the number of whites above JC 10 as being 150, when the correct number was 160, and the corresponding division should have been 21.2% rather than 19.9%. Its calculation of the percentage of blacks in such positions, 12.2%, was correct. Actually, the Fifth Circuit made a greater miscalculation, for the percentage of whites assigned to job classes over 10 was not 80.7% but rather the 21.2%.

[15] This court considered plaintiffs' statistics deficient in failing to take account (a) of the higher rate of functional illiteracy among black employees and (b) of the time required for blacks, previously discriminated against, to obtain skills useful to supervisors. The Fifth Circuit held that these two factors would be pertinent in evaluating the statistics only if, *inter alia*, the court found that literacy and acquisition of the job skills were bona fide occupational qualifications — a finding which this court had not made.

[16] See Mayor v. Educational Equality League, 415 U.S. 605, 620(1974).

[17] Cf. Castaneda v. Partida, 45 LW at 4306, n.19.

[18] Of the 415 monthly promotions reported from January 1969 through May 1974, 403 — or 97% — were appointments of a person then in the department. Of the 13 "inter-departmental" temporary promotions, virtualy all involved an assignment to closely related work, e.g., an Inspector to the department in which he performed his duties or an Assembler from one department being assigned as foreman for assembly work in another department.

[19] DX-282 details the department promotions by month from January 1969 through May 1974. DX-334 provides the essential information on a quarterly basis back to January 1967.

[20] Prior to 1971 the turn-down rate by blacks was higher, and subsequent to 1972 the rate was probably lower. The 1971-73 figures should be reasonable approximation for the period as a whole.

[21] Plaintiffs assert that the requirement of either training or outside experience was a barrier designed to deter blacks. The court is persuaded that, to the contrary, it was both a valid requirement and was indeed intended to rpevent on-the-job training of unqualified whites. The requirement was not put in until black employees were given an opportunity to demonstrate their skills as welders.

[22] Turn-downs by blacks in the welding department were a significant factor.

[23] This is not to say that at no time has any black been the victim of discrimination in the selection of temporary foremen. On some isolated occasion — although the court was not shown this in the evidence — there may have been such an incident. For the plaintiffs to prevail at the "liability" phase of the case, thereby creating a presumption of discrimination with respect to individual class

members, there must however be established a policy of practice of discrimination. It may be noted that general notice of the trial of the case was given, with the invitation to class members to present evidence if they chose. It is unnecessary for the court to determine at this time whether an individual class member could, although unaided by any presumption of discrimination, still present by other litigation a claim of discrimination, for example, as to a supervisory position.

APPENDIX D

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, A Division of Pullman Inc., et al., No. CA 71-P-0955-S, October 11, 1977

POINTER, District Judge: — By motions timely filed on July 15, 1977, plaintiffs seek to alter or amend the judgment of July 5, 1977, or, in the alternative, a new trial.

Plaintiffs first ask that the court produce the chart used by it in arriving at certain conclusions about departmental assignments and identify the source documents relied upon. As to the latter request, the information was simply that derived from the annual seniority lists themselves (PX-4 et seq.), looking to those new employees in each department who "survived" long enough to be listed on the succeeding June 1st roster. This is the same approach as was used in the original decision in reconstructing the June 1, 1965, seniority list. It is unnecessary for the court to reproduce the tabulation of such assignments by race, department, and year, as the same information is readily available in the exhibits on file.

Plaintiffs next assert that the court erroneously used a period of 90 days prior to filing of an EEOC charge as the commencement date for evaluating evidence concerning departmental assignments allegedly in violation of Title VII. The argument is that the 1972 amendment to Title VII, extending the time for filing charges to 180 days, has generally been given retroactive effect. See, e.g., Davis v. Valley Distributing Co., 522 F.2d 827, 10 FEP Cases 1473 (CA9 1975). Plaintiffs are probably correct. While this court's use of the 90-day period followed the opinion in United Air Lines Inc. v. Evans, 431 U.S. 553, 45 LW 4566, 14

FEP Cases 1510 (May 31, 1977), that case did not actually constitute a holding against retroactivity of the 1972 amendments. Evans rather involved a situation in which the charges would have been stale under either period of time.

As noted in the July 5th opinion at fn. 5, it is doubtful that plaintiffs can take advantage of the Commission-initiated charge of March 27, 1967. However, even if this be proper and if the plaintiffs have the benefit of a period of 180 days, the ultimate result stays the same. For the court nevertheless remains persuaded under the evidence that there was no practice of discriminatory assignments to departments after September 28, 1967, anymore than there was after December 27, 1967.

Plaintiffs argue that this court was prohibited by the mandate of the Fifth Circuit from reconsidering the question of whether there had been discriminatory assignments. To the contrary, however, it is clear that this court was in the remand order being directed to reevaluate from a new perspective whether racially discriminatory assignments had occurred, with this court to determine afresh the inferences that should be drawn from the evidence presented.

Finally, plaintiffs say that they should be given the opportunity to present additional evidence to demonstrate the invalidity of the seniority system in the light of International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 45 LW 4506, 14 FEP Cases 1514 (May 31, 1977).[1] This case was prepared for trial — as shown by the limitation of issues recited in this court's original opinion and in the appellate court's opinion — on the theory, then well recognized in this circuit, that a violation of Title VII could be shown by proof of a neutral seniority system which perpetuated the effects of pre-Act discrimination. Trial was conducted on such a limitation of issues, with consequent inattention by plaintiffs to possible evidence showing the seniority system to have been instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964.

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[1]All footnotes for this section appear at the end of this Appendix, p. A-127.

Somewhat similar situations have been recently considered by the Fifth Circuit. In each it was held that the opportunity should be given for presentation of further evidence in the light of Teamsters. See Sabala v. Western Gillette, Inc., 559 F.2d 282, 15 FEP Cases 1809 (CA5 No. 74-2711); Sept. 16, 1977); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (CA5 No. 75-2176, at p. 6031; Sept. 19, 1977). The concern that a final decision affecting such important interests, including those of represented class members, be based upon the true facts — rather than upon those presented under what now appears to have been an erroneous interpretation of the law by all parties and by the court — leads this court to the conclusion that a new trial should be granted. The new trial will, of course, be for the limited purpose of receiving new evidence from plaintiffs and defendants upon the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964.

In making this ruling, the court would express the caveat that not all previously tried employment discrimination cases are due to be re-opened — that this particular case happens to be one which was under submission when Teamsters was decided and which had been tried at a particular point in time when all concerned acted under what, as it turned out, was an erroneous view of the law.

Order

In accordance with the accompanying Memorandum of Opinion, it is ordered that a new trial be granted, limited, however, to presentation of additional evidence relevant to the issue of the validity of the seniority system under Section 703(h) of the Civil Rights Act of 1964. The parties may proceed with further discovery as may be appropriate to that end.

Appendix D - Footnotes

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[1] Plaintiffs say they were unaware that this court was withholding judgment in anticipation of the Teamsters case; and the court has no reason to doubt this, acknowledging that it did not tell the parties it was doing so. However, it should be noted that, in presence of plaintiffs' counsel, the court was requested by the defendant union to await the outcome of such decisions, with union's counsel at the time providing the court with a copy of the transcript of arguments made before the Supreme Court.

APPENDIX E

SWINT v. PULLMAN-STANDARD

U.S. District Court,

Northern District of Alabama

SWINT, et al. v. PULLMAN-STANDARD, et al., No. 71-P-0955-S, May 5, 1978

Full Text of Opinion

POINTER, District Judge: —

MEMORANDUM OF OPINION

(Pullman-Standard V)

An understanding of the issue now before the court — involving the validity of the seniority system at Pullman-Standard under Section 703(h) of the Civil Rights Act of 1964 — requires some consideration of the history of this litigation:

(1) Pullman-Standard I. In September 1974, following a sixteen day trial, this court held, with minor exceptions, against the plaintiffs' individual and class claims of discrimination. *Inter alia,* it found Pullman's departmental seniority system not violative of Title VII, basing that decision in large part upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignments to most of the departments. See 8 EPD ¶9720, 11 FEP Cases 943

(2) Pullman-Standard II. In August 1976, the Court of Appeals remanded the case for reconsideration on certain issues, including that relating to the attack on the seniority system. The court emphasized that discrimination in assignments could be established without regard to the relative desirability of the various departments — i.e., that

there is no "separate but equal" doctrine in employment situations. See 539 F.2d 77, 13 FEP Cases 604 (CA5 1976).

(3) Pullman-Standard III. In July 1977, after receiving additional evidence, this court again ruled against the plaintiffs' claims. While finding, under the standards outlined by the appellate court, that there had been discrimination in departmental assignments, it determined that such assignments had pre-dated the time period covered by EEOC charges. Concluding that the evidence had shown the seniority system to be valid under Section 703(h), the court found the claims barred under International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). See 14 EPD ¶7815, 15 FEP Cases 144.

(4) Pullman-Standard IV. In October 1977, on timely motion by the plaintiffs, the court reopened the case for additional evidence relating to the validity of the seniority system under Section 703(h). See 15 EPD ¶7993, 15 FEP Cases 1638.

In January 1978 further evidence in the form of testimony *ore tenus,* depositions, interrogatories, and exhibits was presented to the court. The parties, having rested,[1] were then directed to file post-trial briefs.

A. Burden of Proof.

According to the company's brief, the plaintiffs have the burden of showing invalidity of the seniority system. In the sense that the plaintiffs had the burden of "going forward with the evidence" at the most recent hearing, this is certainly true; for at that time, based on the prior state of the evidence, both this court and the Fifth Circuit had adopted various findings supporting the validity of the seniority system.

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[1]All footnotes for this section appear at the end of this Appendix, pp. A-149-A-152.

Imposition of the ultimate "burden of persuasion" is, however, another matter. The defendants could, with considerable logic, argue that Section 703(h) is interrelated with Section 703(a) in delineating an "unlawful employment practice", Frank v. Bowman Transportation Co., 424 U.S. 747, 758, 12 FEP Cases 549, 553 (1976), and that therefore the plaintiffs should have the burden of establishing inapplicability of Section 703(h).

[1] A contrary conclusion is here reached by the court — namely, that where the plaintiffs establish a disparate impact resulting from a seniority system (by reason of prior discriminatory practices), the defendants, as in the nature of an affirmative defense, have the burden to show that the seniority system in question was bona fide and that the differences caused thereunder were not the result of any intent to discriminate on the basis of race or color. The situation is analogous to that involving use of ability tests under this same Section 703(h), where the employer is held to have the burden to demonstrate applicability of the exclupatory provision of Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); also see Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 10 FEP Cases 1181, 1190 (1975); Teamsters, supra, 431 U.S. at 360-61 n.46, 14 FEP Cases at 1529 (1977) ("the employer's burden is to provide a non-discriminatory explanation for the apparently discriminatory result").

B. Seniority System.

The seniority system under attack in this case has its essence in the 1954 company-wide collective bargaining agreement between Pullman and the United Steelworkers. Under that agree-

ment, seniority was measured by length of continuous service in a particular department — there were 26 such USW departments — and was exercised in the event of increases and decreases of forces in competition with all other employees in that department. There were no lines of promotion or progression in any department and, indeed, seniority — again, departmental age — was not formally recognized for promotional purposes until the 1956 agreement. Employees transferring from one department to another were treated as "new" employees in the department to which transferred (i.e., no carryover of seniority) and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department.

There is an additional component — not directly at issue in this litigation[3] — to the seniority system at the Bessemer plant; namely, the existence of two additional seniority units, or departments, represented by the International Association of Machinists and Aerospace Workers. Since 1944, the collective bargaining agreements with the IAM have provided for seniority based on length of service within the particular job classification in the seniority department, without opportunity for carryover of seniority in the event of transfer from other occupations or departments, whether represented by the IAM or not.

The seniority system in effect at Bessemer in 1954 remained virtually unchanged throughout the next eighteen years of collective bargaining between the company, the USW, and the IAM. Then, in 1972, as outlined in prior opinions, provision was made in an OFCC agreement to permit black employees hired before April 30, 1965, to transfer from predominantly black departments or to transfer to predominantly white departments, in either case with carryover of seniority. See Pullman-Standard II, 539 F.2d at 84 nn.15-16, 13 FEP Cases at 609 (CA5 1976). The restriction against carryover of seniority on departmental transfers continued in effect as to such black employees

when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to all white employees. Rate retention (or "red circling") is not afforded for any transferring employee.

For a number of years — until the arbitration decision in March 1965[3] — there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only". This practice in turn, as has been previously found (see Pullman-Standard III), caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in departmental assignments[4] have been perpetuated by the seniority system — a system which determines employment rights on the basis of departmental age and which, even with the 1972 changes, provides barriers to departmental transfers. The plaintiffs deny that the system meets the requirements of Section 703(h), taking issue with the company as to its bona fides and purposes. The applicable legal principles are those stated in Teamsters, supra, as explicated by the Fifth Circuit in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (1977).

(1) Neutrality of System.

One of the factors to be considered, as a part of the "totality of the circumstances in the development and maintenance of the system," is whether it operates to "discourage all employees equally from transferring between seniority units." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In the case *sub judice*, as in Teamsters, the seniority system — at least as it existed prior to 1972 — was facially neutral and, certainly with respect to the facets attacked (i.e., use of departmental age and loss of seniority on transfer), was applied equally to all races and ethnic groups. As this court noted in Pullman-Standard I — and subsequent evidence does not change the court's view — the

departmental seniority system was applied in a uniform manner, regardless of race or color, and the limited number of interdepartmental transfers granted were handled in a fair and non-discriminatory manner. 8 EPD at 5997 n.24, 11 FEP Cases at 949. While many of the grievances and other complaints made by blacks include charges of racial discrimination, these charges are not substantiated by the evidence. See, e.g., Pullman-Standard I, 8 EPD at 5998-99 nn.39, 41 & 50, 11 FEP Cases at 955-956, 958.

To the extent the system "locks" employees into a department and discourages transfers, it does so equally for both white and black — that is, it did so until 1972. Since the 1972 OFCC agreement, a substantial portion of the black employees are given favored treatment by being permitted to transfer their accumulated seniority from certain departments or into certain departments. The plaintiffs hardly have standing to challenge this solitary exception to the principles of neutrality found in the seniority system.

The Supreme Court noted in Teamsters, 431 U.S. at 356, 14 FEP Cases at 1527, that the overwhelming majority of employees discouraged from transferring to line-driver jobs were white. Emphasizing that fact, one might argue that a no-transfer seniority rule should be reviewed for its quantitative impact upon different groups of employees. Such an analysis may, indeed, be useful in the process of evaluating circumstantial evidence. If, to take an extreme example, a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled. Where, however, as here, a rule affects significant numbers of both white and black employees — and does so in an identical manner — it would be a misreading of Teamsters, in this court's view, to determine "neutrality" on the basis of its quantitative effects. Indeed, according to n.24 of the decision of the court of appeals in Teamsters, 517 F.2d 299, 312, 11 FEP Cases 66, 75

(CA5 1975), it appears that 95% of the non-white employees were affected by the rule precluding transfer to line-driver jobs, whereas only 59% of the whites were so affected. As noted in the Supreme Court opinion, 93% of the black and Spanish-surnamed American drivers were not line drivers, and only 38% of the white drivers were not line drivers. 431 U.S. at 342 n.23, 14 FEP Cases at 1521-1522. The reference by the Supreme Court to the numerical impact of the rule should be understood as providing additional support, and not as a *sine qua non,* for its decision — particularly since it apparently accepted the lower court's findings that non-whites had suffered the most from the rule. See 431 U.S. at 344, 349-50.

By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could however attempt to measure the relative effect of the no-transfer rule on white and black employees, i.e., to determine which group was the more discouraged from transferring. It may well be that a somewhat greater impact was felt by blacks than whites, although — as indicated in the chart considered in Pullman-Standard I for a somewhat different purpose and subsequently analyzed in Pullman-Standard II — this conclusion is by no means certain. In any event, the rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite — equality or neutrality — without reference to such desirability. Under this approach, it is clear that the per-1972 no-transfer rule applied equally and uniformly to all employees, black and white, and that, given the approximately equal number of employees of the two groups, it was quantitatively neutral as well.

(2) Rationality of Seniority Units.

A second factor under Teamsters, is, in the words of the Fifth Circuit, "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." James, supra, 559 F.2d at 352, 15 FEP Cases at 861. In so stating this factor, the appellate court seems to be suggesting that separate seniority units may be more acceptable if in the same bargaining unit than if in different bargaining units, in which latter situations one should make further inquiry as to rationality and industry practice. It is doubtful that such a proposition was intended by the circuit; at least there appears to be nothing in Teamsters to support such a principle, and it would logically seem that, if anything, greater scrutiny should be given to separate seniority units within the same bargaining unit than to ones in different bargaining units. It may well be that — in discussing the restriction against transfers to line-driver jobs as involving separate bargaining units, which was itself viewed as rational, in accord with industry practice, and consistent with NLRB precedents — the Supreme Court was not proposing a standard for Section 703(h), but was rather highlighting facts which demonstrated the bona fides of the seniority rule there in question.

In any event, this court is bound to follow the rulings of the Fifth Circuit. A solution — one which is in keeping with the admonition to use a "totality of circumstances" approach — is to inquire into rationality and industry practice not only when seniority units are in different bargaining units, but also when they are in the same bargaining unit.

[28 SENIORITY UNITS]

The division of the plant's work force into twenty-eight separate seniority units — 26 USW units and 2 IAM units — has remained essentially unchanged since 1954.[5] While this at first glance appears to be an unusually large number of departments,

it must be viewed in the context of the diversity of operations at the plant, the extreme fluctuations in employment levels,[6] and — what is particularly significant — the opportunity to use seniority within the unit for any job without the barrier of any lines of promotion. Given these facts, the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacements, highly inefficient performance, or excessive grievances over ability factors — or all of them.[7]

One can, of course, raise questions about particular units and can ask whether other configurations would, from the later perspective of the courtroom, make more sense. For example, the plaintiffs note that the Steel Miscellaneous department owes its separate existence — since 1952 — to no apparent reason other than the fact that, prior thereto, there were two work gangs in the Steel Stores department. Whether it is rational to have separate seniority units based upon the fact that the two groups worked under different foremen may be debated; but it should be noted that this separation came about as a result of collective bargaining at which blacks, as well as whites, were representing the union, and the two units created had roughly comparable racial compositions. On the other hand, while the company's apparently unilateral creation of a separate Inspection department in the late 1940's, drawing the inspectors from the various operating departments into a separate unit, can be seen as having a racial impact (all the inspectors were white)[8], this change was certainly rational — removing them from responsibility to the very persons whose production they were being called upon to inspect.

In context, and taken as a whole, the seniority units at Pullman's Bessemer plant constitute a rational structure. They are, moreover, consistent with practices which were at the time generally followed at other unionized plants throughout the

country, at other companies in the same industry, and indeed at Pullman plants located outside the South where race was presumably not a potential consideration.

As stated by the Supreme Court,

"In addition, there is not reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. *** The legislative history contains no suggestion that any one system was preferred."

Teamsters, supra, 431 U.S. at 355 n.41, 14 FEP Cases at 1527. Indeed, as the company has established — by publications of the Department of Labor, arbitration awards, decisions of the War Labor Board, various collective bargaining agreements, and contemporaneous studies made by it at the time of contract negotiations — seniority by departmental age such as found at Bessemer was the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular.[9]

[OTHER PLANTS]

The number of separate departments found at Pullman's Bessemer plant is less than that (40 departments) at American Car and Foundry's plant at St. Charles, Missouri, and than that (29 departments) at Eastern Car Company's plant in Nova Scotia. The same number of departments (28) are found at Pullman's plant in Butler, where less than 1% of the employees were black; and the lesser number of departments found at Pullman's plant in Hammond, also having a small percentage of black employees, should be reviewed in the light of the more limited operations there conducted.[10]

There are, as would be expected, differences between the departmental configurations at Pullman's three plants; and some of these are emphasized by plaintiffs as indicating the existence of racial considerations at Bessemer.[11]

Plaintiffs note that the Truck, Wheel and Axle shops at Hammond are in a single department, while at Bessemer the Truck shop (which remained all-black until 1968-69) and the Wheel & Axle shop (racially mixed) are separate departments. Although any overlap of occupational titles in the two departments is insignificant, it may be - the evidence is not clear - that there is a sufficiently close relationship between the jobs in the shops that they could be in the same seniority unit, rather than in different ones. It should, however, be noted that the two shops were treated as separate departments before any unionization or seniority,[12] that they were certified by the NLRB for inclusion in separate representational units, [13] and that for a time they were covered under separate collective bargaining agreements with different unions. Moreover, when the company proposed merger of these and other departments, the proposal was unanimously rejected by the union at a meeting where the majority in attendance were black.[14]

Plaintiffs likewise complain that at Butler and Hammond there is a separate Electrical & Crane department, while at Bessemer cranemen are in more than one department. Here again, cranemen at Bessemer were not in a single department prior to unionization and seniority (indeed, they were in five separate departments), the electricians were certified by the NLRB to be in a different bargaining unit, and for a period of time the two groups were covered under separate collective bargaining contracts with different unions. When consideration was given in the 1950's to possible formation of an Electrical & Crane department at Bessemer, company officials at Butler advised against the practice based on their actual experience. Rejection by the company of union proposals to merge a small

seniority unit having some of the cranemen (the Mobile Crane department) into either the Railroad department or the Maintenance department appears to have been based on business considerations, not racial ones - for all three of the departments were racially mixed.

[FACET OF ATTACK]

A primary facet of plaintiffs' attack is their challenge to the two Die & Tool departments and the two Maintenance departments at Bessemer. No similar situation exists at Pullman's Butler and Hammond plants, and indeed there were no such divisions at Bessemer prior to unionization and seniority. The key here is that responsibility for this situation cannot properly be placed on either of the real defendants - the company or the USW - and that, moreover, this circumstance does not diminish the bona fides of the seniority system under attack - that between the company and the USW.

The existence of these divided departments is due to actions of the NLRB in 1941, when it - at the request of other petitioning unions - divided the plant into three representational units for election purposes. This was done over the opposition of the predecessors'' of the USW, which sought to represent all production and maintenance employees. The company properly adopted a "hands-off" attitude on formulation of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omit-

ted other positions in those departments, they being in the unit for which the USW gained recognition. Hence - and it is difficult to understand how the company and the USW could have legally done otherwise - it resulted that there were two Die & Tool seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in Teamsters, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections.

Much effort is expended by the plaintiffs to show that the NLRB erred in determining which occupations should and should not have been treated as craft and craft-related jobs and that the result of that decision was to create for a few years[16] all-white IBEW bargaining unit and to establish after a few years[17] an all-white IAM unit. The collateral attack on the NLRB decision by plaintiffs in this litigation, filed more than twenty-five years later, must fail, if for no other reasons, because the real defendants - the company and the USW - are not chargeable with responsibility for those events and because such matters do not impair the validity of the seniority system to which they did agree. If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect.

Also criticized by plaintiffs are certain other departments at Bessemer - such as the Inspection, Boilerhouse, Railroad, and Janitors[18] departments - seeing the existence of such departments as frustrating opportunities for black employees. These same departments, however, are likewise to be found at either the Hammond or Butler plants, or both. Indeed, putting aside those departments whose existence was incident to the recognition of three separate unions,[19] the configuration of departments at Bessemer is quite similar to that at Pullman's Butler plant. There are, in fact, two instances where broader seniority

is provided at Bessemer than at Butler - Butler's Punch and Shear departments being combined at Bessemer into a single department, as is also true with respect to the Paint and Shipping Track departments.

Individual differences in the departmental structures at Pullman's Bessemer and Butler plants, such as they are, do not establish that either is irrational or inconsistent with industry practices. While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective should be to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. As stated by the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39, 31 LRRM 2548 (1953),

"A wide range of reasonableness must be allowed a statutory bargaining representative * * * subject always to complete good faith and honesty of purpose in the exercise of its discretion. * * * Variations acceptable in the discretion of bargaining representatives * * * may well include differences based upon such matters as the unit within which seniority is to be computed."

(3) Genesis of Seniority System.

Next the court must consider "whether the seniority system had its genesis in racial discrimination." James, *supra*, 539 F.2d at 352, 15 FEP Cases at 861. Taken from a factual finding in Teamsters, this factor, while ambiguous, is presumably not wholly dependent[20] upon a determination that racial discrimination had a causative relationship with the seniority system. It rather implies that consideration should be given to the extent of racially discriminatory practices at the time the seniority system came into existence.

In the case *sub judice,* two times of "origin" might be examined - in 1941 - 42, when union organizational efforts were finally successful and the first collective bargaining agreements were signed; or in 1954, when the seniority system under attack in this litigation became essentially fixed. Selection of the more appropriate date is not, however, critical under the circumstances of this case, for the evidence reflects similar practices at both periods.

Both in 1941 and in 1954, racial segregation was extensively practiced at the company's Bessemer plant, in the local union hall, and in the community as a whole. Most of the jobs at the plant were by custom treated as "white only" or "black only" - or, more accurately, as "white" or "colored". Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records - including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing - included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated. The court can take judicial notice of the widespread extent of segregation in the community - in schools, transportation, public accommodations, et cetera.

Considering the apparent pervasiveness of such discrimination, one may naturally infer that related matters - such as a seniority system - must, even when facially neutral, have been the product of the same discriminatory animus. And yet, based on the very extent of such other forms of discrimination, it may well be that racial considerations were not involved - being "unnecessary" - in the development of a particular practice. Great care should be given in drawing the correct inference from such evidence, as has been illustrated in voter dilution cases where similar circumstantial evidence has been presented. See Taylor

v. McKeithen, 499 F.2d 893, 896 (CA5 1974); McGill v. Gadsden County Commission, 535 F.2d 277, 280-81 (CA5 1976); Nevett v. Sides, — F.2d —, slip op. 3373 (CA5 1978).

[UNIONIZATION]

One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 - one which , due to laws of the United States and their enforcement by the NLRB, treated the two races as the same - was the unionization effort by the predecessor of the USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit. In 1954, as was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and positions of the union - the local not being dominated by whites. While possessing some of the trappings taken from an otherwise segregated society,[21] the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations.

Although determined by collective bargaining, a seniority system may properly be viewed as the manifestation of a union objective, one which operates in opposition to and as a limitation upon the managerial powers sought by the company. This generalization is shown by the evidence to be applicable to the case *sub judice*, where, although certainly affected by the process of negotiation, the seniority system under attack is essentially the product of USW aims and policies. The use of departmental age for seniority purposes was adopted in the first 1941-42 contract at the request of the USW's predecessor. The return to departmental age in 1954, as a consequence of the first company-wide collective bargaining agreement, was in fact a

broadening of the seniority by "occupation-within-a-department" which had been adopted in 1947 at the urging of the USW local - indeed, at the request of a black member of that USW negotiating committee. Since 1954 the union has continued its support for departmental seniority and has rejected certain company efforts to merge departments for broader seniority.

The seniority system under attack had its genesis - whether viewed as being in 1941-42 or in 1954 - at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which - unlike most structures and institutions of the era - was not an arm of a segregated society. Nor did it foster the discrimination - of treating certain jobs as being for one race or the other - which was being practiced by custom in the plant. Indeed, it was this very seniority system which, as a result of arbitration in 1965, provided the means for stopping that discrimination even before the effective date of Title VII.

In reviewing the history of collective bargaining at Pullman's Bessemer plant, an inquiry which has relevance to and could be treated under each of the four James factors, the plaintiffs note the role played by the IBEW. During its short-lived tenure, the IBEW was an all-white unit - a matter, however, for which neither the company nor the USW can be blamed. In any event, it was decertified in 1946, with its members being reabsorbed into the Maintenance department represented by the USW. The next USW contract, at the suggestion of a black member of the negotiating committee, provided such persons (no differently from other USW members) with occupational seniority. While the plaintiffs challenge the spin-off of one part of the former IBEW members into a separate department (Powerhouse) in 1954 when departmental seniority was reinstituted, it should be noted that this provided them with no greater seniority protec-

tion than they had enjoyed during the 1941-46 period when they were part of an all-white representational unit.

[ROLE OF IAM]

Even greater stress is placed by the plaintiffs on the role of the IAM. Plaintiffs view the evidence as showing that the IAM never wanted to represent any black employees and that, by a series of maneuvers including agreements with the NLRB and later a partial ceding of members, it was able to eliminate blacks from its membership, a matter which continued until passage of Title VII. While the objective facts are not greatly in dispute, the defendants here do challenge the characterization of the IAM motives, asserting that the changes took place because of initial confusion over which craft and craft-related positions should be properly represented by the IAM and because of subsequent loss of support of the IAM by many of its members.

Whatever the motives of the IAM in the 1941-42 period - the court finds it unnecessary to resolve this factual dispute - the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs who had not honored picket lines. Its representation of those who had been a part of the original USW group. The departments of the former IAM members were, with one exception (the Air Brake Pipe Shop), the same as had existed prior to any unionization or seniority rights. While the Air Brake Pipe Shop was treated after the 1954 contract as a separate department, this provided no greater seniority protection than such persons

had enjoyed during the 1941-44 period (when they were members of a predominately white representational unit) or during the 1944-54 period (when they were either a separate department under departmental seniority or were under an occupational seniority system).

The effort of the plaintiffs to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The company properly took a "hands-off" approach towards the establishment of the election units and the subsequent modifications of the representational units. It bargained with those unions which were afforded representational status by the NLRB. and did so without any discriminatory animus.

The seniority system under challenge in the case *sub judice* - that between the company and the USW - had its genesis *at a time* when there was wide-spread racial segregation but *not as a result of, nor in furterance of,* such discrimination.

(4) Purposes of Seniority System.

The fourth factor is "whether the system was negotiated and has been maintained free from any illegal purpose." James, *supra,* 559 F.2d at 352. 15 FEP Cases at 861. On the basis of facts already discussed in this opinion, which need not be here repeated, the court finds that the seniority system between the company and the USW has been negotiated and maintained free from any discriminatory purpose. In reaching this conclusion, the court has carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years. This is not a situation, such as was described in James, *supra,* where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The major impediment to employment opportunities for blacks - the custom of treating certain jobs as reserved for members of a particular race - was removed prior to

the effective date of Title VII by the very instrument here under attack, i.e., the seniority system. That system did not then provide - nor has there been any subsequent effort to erect - barriers to the reaching of one's "rightful place" as is typically provided by lines of progression. The provision for seniority by departmental age - which, depending upon viewpoint, may be viewed either as a restriction or as a protection - has been negotiated and maintained by blacks, no less than by whites.

(5) Totality.

[2] The factors extracted by James from Teamsters are ultimately but aids, or focal points, for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system", which is in turn "integral to a determination that the system is or is not bona fide." James *supra,* 559 F.2d at 351. 15 FEP Cases at 861. Looking not only to the four factors at least three[22] of which are found here adverse to the plaintiffs, but also to totality of the system under attack, the court finds and concludes that the system is "bona fide" and that the differences in terms, conditions or privileges of employment resulting thereunder are "not the result of an intention to discriminate" because of race or color. The defendants have met the burden of proving the applicability of Section 703(h) of the Civil Rights Act of 1964. Judgment will be entered accordingly.

III. Attorneys Fees and Costs.

[3] While the defendants have prevailed in this litigation, neither in its institution nor in continuation were the plaintiffs' claims frivolous, unreasonable or groundless. Award of attorney's fees is denied under the authority of Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 46 LW 4105, 16 FEP Cases 502(1978). Costs not previously taxed shall moreover be borne by the respective parties incurring the same.

Judgment

In accordance with the findings of fact and conclusions of law contained in the Memorandum of Opinion filed concurrently herewith, judgment is hereby entered in favor of the defendants. Each party shall bear its own costs.

Appendix E - Footnotes

[1] In March 1978 the plaintiffs moved the court to take judicial notice under FRE 201 of parts of answers to interrogatories filed by the International Association of Machinists in a case in this court involving another company. While judicial notice can be taken under FRE 201(f) after the evidence has been closed, this request is due to be denied as involving matters not covered by FRE 201(b). In short, the matters sought to be noticed are neither "(1) generally known within the territorial jurisdiction of the trial court" nor (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Indeed, while IAM's answers to interrogatories in another case (or even in this case) could have been introduced in evidence *against* IAM as a party-opponent (albeit a party for the very limited purpose of possible relief) under FRE 801(d)(2), such hearsay would not have been admitted against other defendants under FRE 802. Unlike depositions — which have a special rule of admissibility provided in the Federal Rules of Civil Procedure — interrogatories must, when offered in evidence to prove the truth of the matters asserted therein, satisfy some exemption or exception to the hearsay rules of the FRE. See 4A Moore's Federal Practice ¶33.29 [1. — 2]. Even in circumstances where they would have been admissible if offered, the unoffered interrogatories are not treated as evidence or the subject of judicial notice. See Jones v. Diamond, 519 F.2d 1090, 1098 n.13 (CA5 1975); Bracey v. Grenoble, 494 F.2d 566, 570 n.7 (CA3 1974).

[2] The IAM and its Local Lodge 372 were not named in the EEOC charges from which this litigation arose or in the complaints initially filed in this court. They were joined as defendants at the time of trial for the limited purpose that the relief to which the plaintiffs might be entitled against the company and the USW might involve possible modification of the IAM collective bargaining agreements. The limited role of the IAM defendants does not mean, however, as the company apparently contends, that evidence respecting the IAM and its agreements is irrelevant to the issues concerning the validity of the seniority system existing between the company and the USW — such matters being part of the "totality of the circumstances in the development and maintenance" of the system which is at issue. See James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352, 15 FEP Cases 827, 861 (CA5 1977).

[3] It is not without significance to the issue now before the court that it was the seniority system itself which in early 1965 provided the means for overturning the practice of job segregation.

[4] There is no claim that the effects of prior discrimination in segregation of jobs within a department are perpetuated by the USW seniority system, for the system allows use of departmental age for promotions without the interposition of lines of progression. The IAM agreement, measuring seniority by job classification within the department, makes no provision for use of seniority in promotions.

[5] One of the USW departments, the Boiler House, which at its peak had but, three employees, was vacated on June 22, 1964.

[6] See Pullman-Standard II, 539 F.2d at 82 n.3, 13 FEP Cases at 607.

[7] At one of Pullman's four plants (Worcester), a system of plant-wide seniority was adopted. According to the evidence, the problems created by the rule contributed substantially to the ultimate closing of the plant for economic reasons.

[8] Actually, at the time the Inspection department was created, seniority was measured by service in the occupation within the department, so that its creation as a separate department, so that its creation as a separate department deprived no one, white or black, of employment opportunities. With the return several years later to departmental seniority, it did, in retrospect, mean a loss of opportunities to both whites and blacks in the operating departments.

[9] Plaintiffs specifically disavow any intent to condemn all departmental seniority systems. The approach, however, of their attack on the system here in issue includes elements which would apply to all such systems.

[10] The Hammond plant does not build cars. It only provides repair services and produces certain parts and components.

[11] It would be equally appropriate to treat these matters under the factors involving the purposes of the seniority system, for the plaintiffs' attack partakes of both facets.

[12] There is a dispute between the parties as to whether the shops were treated as separate departments prior to unionization. The court finds that, although certain employees in the Wheel & Axle shop were joined with those in the Truck shop for cost accounting purposes, the two were in fact treated as separate departments.

[13] The original NLRB certification and election had included employees of both departments in the same representational unit. However, a clarification was issued the following month by the NLRB to the effect that most of the Wheel & Axle employees were in the IAM unit, with the Truck employees being in the USW unit.

[14] It is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen, and negotiators. While not foreclosing the possibility of discriminatory conduct, see Rodriquez v. East Texas Motor Freight, 505 F.2d 40, 8 FEP Cases 1246 (CA5 1974), these facts are certainly relevant to the issues before the court.

[15] The Steelworkers Organizing Committee later became part of the USW. For simplicity SWOC is treated in this Memorandum as equivalent to the USW.

[16] In 1946 the IBEW was decertified and the employees in the two IBEW units became USW members. Thereafter they were included in USW contracts.

[17] As will be noted infra, a substantial portion of IAM workers were ceded in 1944 to the USW, leaving two IAM units which were, until much later, all-white.

[18] It may be noted that the possibility of merging the Janitors and Plant Protection employees was raised in 1962 by a white member of the union negotiating committee, but rejected by a black member of that negotiating committee who was a member of the Janitors department.

[19] Bessemer's Air Brake Pipe Shop is another which was created as a result of the tri-partite certification and election. It has retained separate existence as a department except during the period when the USW contract called for occupational seniority.

[20] The "genesis" factor, if dependent upon a finding of causation, might well be surplusage in view of the fourth factor ("whether the system was negotiated * * * free from any illegal purpose") unless, that is, the fourth factor were treated as involving only the later period of time when the challenged collective bargaining agreement was negotiated. While "causation" is here held not to be a condition precedent to relevancy under the third factor, it is nevertheless of great

significance in determining its weight. After all, it is the applicability of Section 703(h) that is ultimately before the court. See Southbridge Plastics v. Local 759. Rubber Workers, 565 F.2d 913, 16 FEP Cases 507 (CA5 1978).

[21] E.g., separate seating and separate social functions for whites and blacks.

[22] The "genesis" factor may be said to be favorable to the plaintiffs if causation be ignored and the existence of other discrimination be deemed sufficient.

APPENDIX F

Louis SWINT and Willie James Johnson, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,

v.

PULLMAN-STANDARD, Bessemer, Alabama, United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO and International Association of Machinists and Aerospace Workers, AFL-CIO, Defendants-Appellees.

No. 78-2449.

United States Court of Appeals,
Fifth Circuit.

Aug. 18, 1980.

After remand in employment discrimination action brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C.A. section 1981, 539 F.2d 77, appeal was taken from an order of the United States District Court for the Northern District of Alabama, Samuel C. Pointer, Jr., J., which, inter alia, upheld the validity of employer's seniority system and selection of supervisors. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) although statistics disclosed that employer made significant advancements in elimination of previous all black and all-white departments subsequent to 1966, total employment picture established that employer made racially discriminatory assignments after effective date of Title VII; (2) employer's departmental seniority system was not "bona fide" within meaning of applicable section of Title VII; and (3) employer failed to rebut plaintiff's prima facie case of racial discrimination in selection of supervisory personnel.

Reversed and remanded.

1. Civil Rights key 44(1)

In racial discrimination cases, statistics often demonstrate more than testimony of many witnesses and they should be given proper effect by the courts. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights key 44(1)

Although statistics disclosed that employer made significant advancements in elimination of previous all-black and all-white departments subsequent to 1966, total employment picture established that employer made racially discriminatory assignments after effective date of Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e at seq.

3. Civil Rights key 9.12

Employer's departmental seniority system was not "bona fide" within meaning of applicable section of Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

4. Federal Courts key 858

Findings of fact by district court in Title VII cases are not to be set aside unless they are clearly erroneous, i. e., unless appellate court is left with definite and firm conviction that a mistake has been committed; however, where findings are made under an erroneous view of controlling legal principles, clearly erroneous rule does not apply and findings may not stand. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights key 9.10

Doctrine of business necessity is operative when an employment criteria which is fair in form but discriminatory in operation is otherwise shown by defendant to be related to job performance; however, a bona fide occupational qualification is deliberately calculated by employer to discriminate.

6. Civil Rights key 39

An employment criteria is justified under bona fide occupational qualification defense to a charge of employment discrimination when a certain sex, national origin, or religion is reasonably necessary to satisfy particular business need. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

7. Civil Rights key 9.10

Bona fide occupational qualification exception was not applicable where alleged discrimination in selection of supervisory personnel was based on race. Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C.A. § 2000e-2(e)(1).

8. Civil Rights key 39

Only justification for standards or procedures which operate to deny blacks promotional opportunities is business necessity defense.

9. Civil Rights key 9.10

Factors for determining whether promotional standards and procedures arise from a legitimate business necessity so as not to constitute a Title VII violation are: (1) whether standards and procedures are shown to be significantly related to successful job performance; (2) whether procedures operated to disqualify a substantially higher rate of blacks than whites; and (3)

whether jobs in question have formally been filled by whites as part of a longstanding practice of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights key **43**

Employers failed to rebut plaintiff's prima facie of racial discrimination in selection of supervisory personnel. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Oscar W. Adams, Jr., Birmingham, Ala., Elaine R. Jones, Washington, D. C., for plaintiffs-appellants.

Thomas, Taliaferro, Forman, Burr & Murray, Birmingham, Ala., Bernard Kleiman, Chicago, Ill., Carl B. Frankel, Pittsburgh, Pa., Franklin B. Snyder, Chicago, Ill., for Pullman-Standard.

Cooper, Mitch & Crawford, John C. Falkenberry, C. V. Stelzenmuller, D. Frank Davis, Birmingham, Ala., for United Steelworkers of America, Local 1466, United Steelworkers of America, AFL-CIO & Intern. Ass'n of Machinists & Aerospace Workers, AFL-CIO.

Appeal from the District Court for the Northern District of Alabama.

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

In this class action employment discrimination suit, before us for the second time, we review judgments of the district court rejecting claims of racial discrimination in employment. The claims are primarily aimed at the establishment and continuation of a departmental seniority system and the selection of

supervisory personnel. Because we find certain conclusions of the district court to be inconsistent with the applicable case law and unsupported by the record, we reverse the judgments and remand for proceedings necessary to render appropriate relief.

The original complaint in this action was filed on October 19, 1971, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. The claims of racial discrimination were made against Pullman-Standard, a division of Pullman, Inc., a manufacturer of railway freight cars and parts, United Steelworkers of America (U.S.W.) and its Local 1466, the bargaining representative of most of the production and maintenance workers at Pullman-Standard. Leave of court was granted to amend the complaint to add as a defendant, for purposes of relief other than money damages, the International Association of Machinists (I.A.M.), the bargaining representative of other departmental units at Pullman-Standard. The class was certified pursuant to Fed.R.Civ.P. 23(b)(2) on behalf of all black persons who worked at any time "within one year prior to the filing of any charges under Title VII."

In July and August of 1974, a sixteen-day trial was held in the United States District Court for the Northern District of Alabama. Appellants challenged discrimination in the departmental seniority system negotiated by the appellees, its procedure for assignment of work within the same job classification, promotions to supervisory positions, lack of job posting, and the discharge of plaintiffs' and plaintiff-intervenor Clyde Humphrey. At the close of appellants case, the U.S.W. and Local 1466 filed motions for involuntary dismissal of the claims asserted by plaintiff-intervenor Clyde Humphrey that the union failed to represent them because of their race. The motion was granted and those claims were dismissed. On September 13, 1974, the district court denied the appellants' several claims of racial discrimination. On appeal to this court, we affirmed the

judgment in part and remanded in part for further proceedings with respect to the issues of the seniority system and the selection of supervisors. *Swint* v. *Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976).

FACTS

We need not restate the extensive factual background contained in our decision on the first appeal, *Swint* v. *Pullman-Standard.* The following facts are helpful, however, in discussing the issues relevant to this second appeal.

Since the first collective bargaining agreements were negotiated between Pullman-Standard and the U.S.W. and I.A.M. in 1941, seniority was measured by length of continuous service in a particular department. Seniority has been exercised in the event of increases and decreases of forces, in competition with all other employees in that department. Under the company-wide collective bargaining agreement negotiated in 1954, there were no lines of promotion or progession in any department. Seniority was not formally recognized for promotional purposes until 1956. There was no carryover of seniority. Employees transferring from one department to another were treated as "new" employees in the department to which transferred, and, with limited exception for those transferring at the request of the company or electing transfer in lieu of lay-off, also lost their seniority in the "old" department. Seniority rosters at the company were maintained by department. Departmental age was basically the sole criterion used to determine who was rolled-back or laid-off in the event of reductions, and who was recalled or promoted in the event of force increases or other vacancies in the department. The seniority system in effect in 1954 remained virtually unchanged through the next eighteen years of collective bargaining between Pullman-Standard, and the U.S.W. and I.A.M.

In 1972, provisions were made in an agreement with the Office of Federal Contract Compliance (O.F.C.C.), to permit black employees hired before April 30, 1965, to transfer from predominately black departments or to predominately white departments, in either case, with carryover of seniority. The restriction against carryover of seniority on departmental transfers continued in effect as to black employees when transferring from a "mixed" department to another "mixed" department, as well as to black employees hired after April 30, 1965, and to white employees.

Until the arbitration decision in March of 1965, there was an informal custom at the plant of treating certain jobs as "white only" and others as "black only." This practice caused decisions respecting assignments to departments throughout the plant to be infected during that period with racial considerations. According to the plaintiffs, the effects of this discrimination in the departmental assignments have been perpetuated by the seniority system—a system which determines employment rights on the basis of departmental age, and which, even with the 1972 changes, provides barriers to departmental transfers.

Prior to June 1965 there were no black foremen at Pullman-Standard. At the time of the first trial, approximately ten percent of the salaried foremen were black. The labor market, at the time of this trial, ranged from twenty-five to thirty-five percent black, depending on the age group and area selected. Pullman's work force, depending upon the time selected, ranges from approximately forty-five to almost fifty percent black. Selection of foremen is made by groups of supervisors, without any objective standards or tests. The plant manager and superintendent choose department heads (C foremen) who in turn select tract supervisors (B foremen), production foremen (A or salaried foremen), and hourly (temporary) foremen. The first black salaried foreman was not promoted to the then 143 existing salaried foreman positions until 1966. Four years later,

there were nine black salaried foremen and 151 white foremen. Up until the time of trial, blacks had never been offered either salaried or temporary foreman positions in thirteen of the twenty-eight departments at Pullman-Standard. From 1966 until the time of trial, only twelve blacks were selected to fill fifty-nine salaried foreman vacancies.

THE DISTRICT COURT'S ORDER

On July 5, 1977, the district court, pursuant to our remand for further proceedings with respect to issues regarding the validity of the seniority system and the selection of supervisors, concluded that the seniority system at Pullman-Standard does not discriminate against blacks, is "valid" under 42 U.S.C. § 2000e-2(h), and the appellees did not follow any practice or policy after the effective date of the Act which discriminated against blacks in the assignmet of employees to departments; further, the appellants' prima facie showing of discrimination in the selection of supervisory personnel has been rebutted by the appellees, and no such discriminatory practice existed subsequent to 1966. At the request of appellants, the district court granted a new trial for the limited purpose of receiving new evidence which would have been relevant under the Supreme Court's decision in *Teamsters* v. *United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The present case was under submission when *Teamsters* was decided and had been tried at a time when all concerned acted under what turned out to be an erroneous view of the law. On May 8, 1978, after hearing further evidence, the district court entered an order finding the seniority system in question to be "bona fide" within the meaning of section 703(h) of Title VII.

ISSUES

The critical issues before us are: (1) whether Pullman-Standard made racially discriminatory assignments to departments after the effective date of Title VII of the Civil Rights Act of 1964, (2) whether the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and (3) whether Pullman-Standard successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen.

I

The appellants argue that the district court erred in its finding that Pullman-Standard's post-Act assignments to departments were not racially motivated. In *Teamsters* v. *United States,* the Supreme Court held that a finding of validity respecting a seniority system does not thereby preclude the implementation of remedial measures for persons who seek relief from an employer's *post-Act* hiring discrimination. *See Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Based upon *Teamsters,* and *Franks,* the district court proceeded to make an initial determination whether the seniority system was "valid" under 42 U.S.C. § 2000e-2(h). After finding that the seniority system does not discriminate against blacks and is therefore "valid," the court considered whether there were discriminatory assignments to departments on and after December 27, 1966,[1] and found that there were not.

To facilitate its evaluation of the issue of post-Act departmental assignments, the district court utilized statistics obtained from the compnay's records, which consisted of seniority lists for the years 1965 to 1973.

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[1]All footnotes for this section appear at the end of this Appendix, pp. A-178-A-179.

The district court made a chart showing, for back years starting June 1966, the number of individuals by race, assigned to each of the twenty-eight departments at Pullman-Standard. The court found it useful to look particularly at assignments after December 1966, in the six formerly one-race departments. Although the district court did not reproduce the chart in its Memorandum Opinion, the court interpreted from the chart that Pullman-Standard, after December 1966, was no longer making assignments to departments based on race, except to the extent of attempting to rectify imbalances caused by its earlier discriminatory practices.

[1] "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts. *Jones* v. *Lee Way Motor Freight, Inc.*, [431 F.2d 245 (10th Cir. 1970)];" *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

[2] Our review of the exhibits upon which the district court based its conclusion reveals erroneous interpretations of the statistics contained therein. In 1966, the Die & Tool Department (I.A.M.) included seventy-seven whites and no blacks. The district court found that six blacks and one white were assigned to the Die & Tool Department (I.A.M.), in 1966, and over the next four years, seven other blacks and eight whites were assigned to it. Our review of the evidence indicates that between 1965 and 1970, the company made approximately thirty-six new assignments to this department, all white persons. The first black was assigned to the department in 1970. In 1971, seven whites were assigned to the department along with two more blacks.

In 1966, there were seventy whites in the Maintenance Department (I.A.M.), and no blacks. The district court found that the first post-1966 assignments to the Maintenance Department (I.A.M.), were three blacks and four whites. The record evidence establishes that the company assigned seven new employees to this department between 1967 and 1970, all of whom were white. The first blacks were assigned to the department in 1970 when six blacks were assigned to the department along with four whites.

The district court found that, subsequent to 1966, the first vacancies in the other previous all-white departments are filled by blacks and the first vacancies in the previous all-black departments are filled by whites. At this point, the court essentially ended its analysis and concluded that there was no policy or practice of discriminatory departmental assignments after December 1966. Our examination of the statistics is in the context of the plant as a whole. Although the statistics disclose that the company made significant advancements in the elimination of previous all-black and all-white departments subsequent to 1966,[2] the total employment picture indicates that departmental assignments continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period.

We find the district court's conclusion that no discrimination existed in post-Act assignments to be factually unsubstantiated. We have carefully reviewed the post-Act assignment statistics and, taken as a whole, they clearly support the appellants' contention that Pullman-Standard discriminated against blacks in the assignment of employees to departments after the applicable period.

II

[3] The appellants argue that the district court erred in concluding that the departmental seniority system is "bona fide" within the purview of Section 703(h) of the Civil Rights Act of 1964.

In *Teamsters* v. *United States,* the Supreme Court held that, absent a showing of discriminatory purpose in a seniority system, that system is protected by § 703(h), 42 U.S.C. § 2000e-2(h) from attack on Title VII on grounds. *Harris* v. *Plastics Mfg. Co.,* 617 F.2d 438 (5th Cir. 1980). *Fisher* v. *Proctor & Gamble Manufacturing Co.,* 613 F.2d 527 (5th Cir. 1980). *Pettway* v. *American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978). *Southbridge Plastics Division, etc.* v. *Local Valves & Fittings Co.,* 565 F.2d 913 (5th Cir. 1978). *James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310 (1977), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). Section 703(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

In *James* v. *Stockham Valves & Fittings Co.,* we noted that the analysis in *Teamsters* suggests that the totality of the circumstances in the development and maintenance of a seniority system is relevant to examining "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system [which is] integral to a determination that the system is or is not bona fide." *James,* at 351. *James* extracts four factors from *Teamsters* which are helpful in deciding this issue:

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that

structure is rational and in conformance with industry practice);

3. Whether the seniority system has its genesis in racial discrimination; and

4. Whether the system was negotiated and has been maintained free from any illegal purpose.

James, at 352.

Although the district court appropriately utilized the analysis provided in *James,* we are not satisfied that the court's ultimate conclusion is amply supported by the record evidence.

In consideration of "[w]hether the seniority system operates to discourage all employees equally from transferring between seniority units," *James,* at 352, the district court made several findings. It found that the departmental seniority system was applied in a uniform manner, regardless of race or color, and that the limited number of interdepartmental transfers granted were handled in a fair and nondiscriminatory manner. The district court found that, to the extent the seniority system "locks" employees into a department and discourages transfers, it does so equally for both whites and blacks—that is, it did so until 1972. The district court acknowledged that a somewhat greater impact might be felt by blacks than by whites if one were to rank the 28 U.S.W. and I.A.M. departments according to some perceived order of desirability to determine which group was the more discouraged from transferring. According to the district court, such a study of relative economic desirability would be inappropriate in light of the rationale in our decision on the previous appeal, 539 F.2d 77 (1976). As the district court stated in its order, "if one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite—equality or neutrality without reference of such desirability." Our holding that appellants need not show that they were assigned discriminatorily to less

desirable departments in order to prove a prima facie case of racial discrimination cannot reasonably be construed to preclude consideration of the fact that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites.

While acknowledging differences in the departmental structure at Pullman-Standard from those at other Pullman plants, the district court did not find such differences sufficient to establish the departmental structure to be irrational or inconsistent with industry practices. The court concluded that the seniority units at Pullman-Standard constitute a rational structure, "in context, and taken as a whole." They are, according to the district court, consistent with practices which were, at the time, generally followed at other unionized plants throughout the country, at other companies in the same industry, and at Pullman plants located outside of the south where race was presumably not a potential consideration. In attacking the rationality of the seniority units, appellants primarily attacked the two separate Die & Tool Departments and the two separate Maintenance Departments at Pullman-Standard. No similar situations existed at Pullman's other plants.[3] No such division existed at Pullman-Standard prior to unionization and seniority. The district court placed primary responsibility for this situation on the N.L.R.B. In 1941, at the request of the petitioning unions, the N.L.R.B. divided the plant into three representational units for election purposes. This was allegedly done over the opposition of the predecessors of the U.S.W.,[4] which sought to represent all production and maintenance employees. The district court did not find this circumstance to diminish the bona fides of the seniority system between the company and the U.S.W. The court asserted that the separation within the various units was not, as in *Teamsters,* "consistent with National Relations Board precedent," *Teamsters,* 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections. Accordingly, the court found the departmentalization at Pullman-Standard to be

rational, in accord with industry practice, and consistent with N.L.R.B. policies.

The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races.

As of the date of its certification to represent employees of Pullman-Standard, November 19, 1941, the I.A.M. unit included twenty-four black workers. Shortly thereafter, agreements between the I.A.M. and Steel Workers Organizing Committee (S.W.O.C.)[1] resulted in the I.A.M. giving its black members to the S.W.O.C. in return for two of the S.W.O.C.'s white members, which resulted in the I.A.M. being an all-white bargaining unit. The first U.S.W. contract with Pullman-Standard, providing for departmental seniority, excluded blacks from the better jobs. Blacks were relegated to the least remunerative departments. The creation of the new departments in the years subsequent to unionization involved continued separation of the races. The general effect of the new department was to restrict black workers to lower paying jobs. For example, the seniority rosters indicate that between 1947 and 1952, the all-white watchmen and all-black janitors were both in the Safety Department. The 1953 seniority list carries both jobs under a Plant Protection Department. The 1954 seniority list shows the janitors in an all-black Janitors Department and the watchmen in an all-white Plant Protection Department. They remained separate departments until the time of trial.

The evidence further indicates that the Pullman-Standard plant is the only one in the Pullman family with two separate bargaining units for its production and maintenance workers.

The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments.

The district court determined that the seniority system in the present case has its genesis at a time when there was widespread racial segregation, but the system was not itself the product of this bias. The court took judicial notice of the widespread extent of segregation in the community in 1941-42, when organizational efforts were successful and the first collective bargaining agreements were signed, and also in 1954, when the seniority system in this litigation became essentailly fixed. At both times, racial segregation was extensively practiced at Pullman-Standard, in the union hall, and in the community as a whole. Most of the jobs at the plant were, by custom, treated as "white only" or "black only." Bath houses, locker rooms, and toilet facilities were racially segregated. So were company records, including employee rosters, internal correspondence, records of negotiation sessions, and lists of persons picketing. The court acknowledged that in 1941, some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions at the unions were also segregated.

The court found that, although the U.S.W. Local possessed some of the local trappings taken from an otherwise segregated society, it did not function in fact to foster and maintain segregation. Rather, it served a joint interest of white and black workers for a higher priority than racial considerations. Further, in 1954, as well as 1941 and the intervening years, blacks

were involved actively in the leadership of the local union and had an equal vote in the formulation of the policies and positions of the union, the local not being dominated by whites.

The court took into consideration the plaintiffs' contention that the I.A.M. effectively eliminated blacks from its membership. The court dismissed the relevancy of this point by concluding that the U.S.W. cannot be charged with racial bias in response to the I.A.M. situation and that the U.S.W. sought to represent all workers, black and white, in the plant.

The district court's failure to recognize the I.A.M. as a party to the present case blemishes its consideration of the genesis of the seniority system. Although the I.A.M. is a party to the present case for purposes of relief other than money damages, it is indeed a party. The motives and intent of the I.A.M. in 1941 and 1942 are significant in consideration of whether the seniority system has its genesis in racial discrimination. The I.A.M. was one of the unions which unionized the company in 1941 and the evidence reflects that the I.A.M. manifested an intent to selectively exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding. The record makes clear that blacks were restricted from the better jobs under the first U.S.W. contract. The district court itself indicated that the first instance disclosed by the record in which the U.S.W. sought to remove the restriction of "black only" jobs was in 1965. It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter.

The district court found that the seniority system had been negotiated and maintained free from any discriminatory purpose. According to the court, this is not a situation, as was described in *James* v. *Stockham Valves & Fittings Co.*, where a company has opposed broadening of seniority or has shown intransigent adherence to unlawful employment practices. The court asserted that the major impediment to employment op-

portunities for blacks—the custom of treating certain jobs as reserved for members of a particular race—was removed prior to the effective date of Title VII by the very instrument under attack, i.e., the seniority system. Finally, the court found that the provision for seniority by departmental age has been negotiated and maintained by blacks as well as whites.

The court concluded that it found at least three of the four factors provided for analysis in *James*, in addition to general considerations of the totality of the system under attack, to be adverse to the plaintiffs. Therefore, the system was determined to be "bona fide."

Having carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is "bona fide" within the meaning of section 703(h) of Title VII, we reject the district court's finding.

[4] An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.[6] There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.

The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S.C. §2000e-2(h).

III

The district court concluded that plaintiffs had made a prima facie case of racial discrimination in the selection of supervisory personnel but that the defendants rebutted it.

The district court accepted Pullman-Standard's insistence that "special skills" are needed to be supervisors. The court acknowledged the practice at Pullman of selecting salaried supervisors from the ranks of those who have purportedly demonstrated their capabilities as temporary foremen. This limitation was found by the court to be a bona fide occupational qualification, sufficient to rebut plaintiffs' prima facie showing with respect to salaried supervisors.

The court considered it appropriate in this case to analyze promotions to temporary foreman on a departmental basis. Promotions to temporary foreman are made according to the needs of the individual departments, they are made by the supervisory personnel in that department, and are made from the employees working in that department. The district court found this restriction of such temporary promotions to persons

working in the particular department to be a "bona fide occupational qualification, justified by business necessity, under the evidence in this case."

The fact that blacks were concentrated in certain departments, and were not significantly represented in departments from which supervisors were selected as needed, was taken into consideration by the district court. The court focused on the large disparity in promotions in the Welding Department. During 1967 and 1968, there were twenty promotions in that department and not a single black was selected. The problem, according to the district court, was that black welders had only a few months of experience as welders at that time, and did not possess the skills needed to act as formen in that department. This was considered not to be the result of any post-Act discrimination—the company had actively sought and trained blacks to be welders. But, to prevent employment of unqualified welders, the company adopted procedures to verify qualifications.

First, the district court's finding that "the restriction of . . . temporary promotions to persons working in the department is a bona fide occupation qualification, justified by business necessity . ." confuses the definite distinction between a bona fide occupational qualification defense and a business necessity defense. Although the two concepts are similar and distinct, and apply to different factual situations.

[5,6] The doctrine of business necessity is operative when an employment criteria which is "fair in form, but discriminatory in operation" is otherwise shown by the defendant to be related to job performance. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 431, 91 S.Ct. 849 at 853, 28 L.Ed.2d 158. A bona fide occupational qualification, on the other hand, is deliberately calculated by the employer to discriminate. An employment criteria is justified under the bona fide occupational qualification defense when a certain sex, national origin, or religion is reasonably

necessary to satisfy a particular business need. *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1970). *See also, Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971).

We proceed, therefore, to consider whether the defense set forth by Pullman-Standard qualifies as either a bona fide occupational qualification or a business necessity defense.

[7] Title VII, 42 U.S.C. § 2000e-2(e)(1) permits discrimination in hiring and employment "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Neither race nor color is included in this section. We believe that the omission of race and color as bona fide occupational qualifications was deliberate and intentional on the part of Congress. Our interpretation of the legislative history of this section is that Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business. Senators Clark and Case, the floor managers for the Civil Rights Bill in the Senate, submitted to the Senate and "Interpretative Memorandum" to explain the exception:

> • • • [The Section] creates certain limited exceptions from these prohibitions [of section 703]. First, it would not be an unlawful employment practice to hire or employ employees of a particular religion, sex, or national origin in those situations were religion, sex, or national origin is a bona fide occupational qualification for the job. *This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence.* This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational

> qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion * * * (110 Cong.Rec. 7213; emphasis supplied).

Diaz v. *Pan Am World Airways, Inc.*, 311 F.Supp. 559 at 569 (S.D.La.), rev'd. on other grounds, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). The legislature, therefore, has indicated that customer preference may be considered under the limited "bona fide occupational qualification" exception in the areas of religion, sex, and national origin, but not on grounds of race or color. *See also, Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Since the alleged discrimination in this case is based on race, the bona fide occupational qualification exception cannot be applicable.

[8,9] It is settled in this circuit that "the one and only justification for standards or procedures which operate to deny Blacks promotional opportunities" is the business necessity defense. *Rowe* v. *General Motors Corp.*, 457 F.2d 348 at 354 (5th Cir. 1972). We provided in *Rowe:* "The only justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that the standards or procedures arise from a nondiscriminatory legitimate business defense. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Local 189, United Paper Makers and Paper Workers, AFL-CIO, SLC* v. *United States*, [416 F.2d 980 (5th Cir. 1969)]." *Id.* at 354. Further, we derived from *Griggs* v. *Duke Power Co.* three factors for determining whether promotional standards and procedures arise from a legitimate business necessity so as not to constitute a Title VII violation: "(1) The standards and procedures were not shown to

be significantly related to successful job performance. (2) The procedures operated to disqualify a substantially higher rate of Blacks than Whites. (3) The jobs in question had formally been filled by whites as part of a longstanding practice of discrimination. . . ." *Rowe* at 355.

[10] That factors two and three of the standard quoted above apply in favor of the appellants in this case is a foregone conclusion. In evaluation of the first factor, we are influenced by the lack of any articulated or defined skills which are necessary to perform capably as a temporary or salaried foreman at Pullman-Standard. Further, with regard to the promotion to temporary foremen of those within the particular department to which promoted, the evidence indicates that a substantial number of salaried and temporary foremen supervise departments in which they have never worked. We are additionally concerned about the low percentage of black supervisors in predominately black departments. We cannot agree that the business need advanced by the defendants for the limitation which restricts the promotion of blacks to supervisory positions is sufficiently compelling to override the significant racial impact of the limitation.

We have further held that for a practice, which is not intentionally discriminatory or neutral but perpetuates consequences of past discrimination, to be justified by business necessity, the practice must "not only foster safety and efficiency, but must be essential to that goal . . . and there must not be an acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' " *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir.), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). The district court did not expose any evidence sufficient to show that the limitation upon which the defendants' business necessity defense rests is essential to the safety and efficiency of the operations at Pullman-Standard, nor do we find evidence in the record to that end.

The district court further considered probative in its analysis of the defendants' rebuttal arguments the fact that blacks refused supervisory promotions to a greater degree than whites; and peer pressure directed by black employees against black foremen discouraged many blacks from displaying good supervisory qualities, from accepting promotions, and from remaining in supervisory postions.

These circumstances undeniably emanate from the very discrimination which the class members seek to eliminate. When insufficient initiatives which purport to rectify a personnel imbalance follow a history of preserving certain personnel positions for a select group based upon race, such peer pressure naturally and conveniently results therefrom. Furthermore, these variables relied upon by the district court do not weigh heavily enough to lessen the appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments. *See Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). We hold, therefore, that the defendants failed to rebut the plaintiffs' prima facie case of racial discrimination in the selection of supervisory personnel.

IV

Pullman-Standard's claim, on appeal, that the class representatives in the present case have no standing to maintain this appeal because their individual claims have been mooted or destroyed is without merit. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). *See also, East Texas Motor Freight* v. *Rodriquez*, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 1898 n. 12, 52 L.Ed.2d 453 (1977); *Franks* v. *Bowman Transportation Co.*

APPROPRIATE RELIEF

Having rejected the district court's finding that Pullman-Standard did not make racially discriminatory assignments to departments after the effective date of Title VII, that the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title VII, and that Pullman-Standard has successfully rebutted appellants' prima facie case of racial discrimination in the selection of foremen, we reverse the judgments appealed from and remand to the district court for proceedings necessary to provide appropriate relief.

REVERSED AND REMANDED.

Appendix F - Footnotes

[1] Although the first primary charge directly bringing into question the company's assignment policies was filed on May 11, 1970, a charge had been previously filed by an EEOC Commissioner on March 27, 1967 questioning the hiring and promotion practices of Pullman. Because the district court found this earlier charge to be susceptible to the interpretation that it related also to assignment and transfer matters, the court used the date 90 days before the March 27, 1967 Commission charge for its analysis.

The 1972 amendment to Title VII extended the time for filing charges to 180 days, and this extension has been considered to be effective retroactively. See, e.g., *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975). But, the district court asserts that it finds there was no practice of discriminatory assignments to departments after September 28, 1966 anymore than there was after December 27, 1966. The 180 day statutory period is inconsequential to this analysis. See generally, *Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980); *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

[2] As of the 1973 seniority list, the Boiler House Department remained the sole one-race (white) department. No assignments had been made, as of the time of trial, to that department since the effective date of Title VII.

[3] At Pullman-Standard, there are two Die and Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union.

[4] The United Steelworkers (USW) evolved from the Steelworker's Organizing Committee (SWOC).

[5] See footnote 4.

[6] Findings of fact by the district court in Title VII cases are not to be set aside unless they are clearly erroneous, *Harrison* v. *Goodyear Tire & Rubber Co.*, 508 F.2d 678 (5th Cir. 1975), Fed.R.Civ.P. 52(a), that is, unless the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), quoting *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Where findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand. *See, Rowe* v. *General Motors Corp.*, 457 F.2d 348, 356 n. 15 (5th Cir. 1972); *United States* v. *Pickett's Food Service*, 360 F.2d 338, 341 (5th Cir. 1966).

In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), we stated:

> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

518 F.2d at 339.

APPENDIX G

Title VII of Civil Rights Act

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703 (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer fro employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school,

college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provison of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any

employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Com-

mission shall accord substantial weight to final findings and order made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such prctice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first years after the effective date of such State or local law. If any requirement for the comencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of

the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the

court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employ-

ment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief jduge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems ap-

propriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (j) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL RIGHTS ACTS OF 1866

Sec. 1981 Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.